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THE

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I.—THE LAW OF MOSES.

FROM the juridical point of view the Law of Moses is a subject quite distinct from the discussion of the Pentateuch and its authorship. Much the greater part of these books is concerned with matters foreign to the English Criminal Statutes; and the current distinction between the Moral law and the Ceremonial law is, for our purpose, not only useless but misleading. I was surprised to find the late Sir J. F. Stephen asserting that the latter portion of the Decalogue formed the foundation of the English Criminal law. The Decalogue is not law at all in the sense in which I understand the term. There is no Criminal law where there is no punishment, and there is no punishment in the Decalogue. Elsewhere, indeed, we find punishments attached to the violation of parts of the Decalogue. Violation of the sixth commandment is punishable by death, and of the eighth commandment by minor penalties, while for the transgression of the tenth commandment no punishment is provided. The reason, in this latter case, is sufficiently obvious. How would it be possible to prove to the satisfaction of a Court of justice that A. had coveted the goods of B.? The tenth commandment forms no part of either the Criminal law

or the Civil law of Moses, and it is only with his civil and criminal legislation that I propose to deal.

Perhaps, I should rather have spoken of the Jewish or Israelitish, than of the Mosaic code; for it does not matter in a juridical discussion whether these laws were rightly or wrongly ascribed to Moses. Still less am I concerned with the question when these laws were first committed to writing. The Common law of England is supposed to have been transmitted from one generation to another for centuries without material alteration, although not committed to writing; and even still there is no legal work in which we can find a full statement of this Common law. Something similar to this may have occurred with the Israelites. Even if the Pentateuch was written in the time of Ezra, the law contained in it may be the law of Moses, orally transmitted by a succession of judges during the interval. The law itself, in my opinion, bears internal evidence of belonging to a much earlier date than the time of Ezra. If it originated, or even was amended, after Israel became a kingdom, we would expect to find in it laws against treason, sedition, resistance to authority, etc. But the law is theocratic, and seems to have been prior even to the time of the Judges, since it is doubtful whether it contains any provisions for upholding the authority of the Judge against those who resisted it. I believe it dates from the time of Moses, and that this fact explains some of its peculiar features.

That under a theocracy offences against religion should be severely punished might have been expected, and in many instances what we regard as trivial offences of this kind were punishable by death. But in this respect the Mosaic code compares favourably with the great majority of the codes which have been in force up to quite a recent period, although the theocratic principle had long since been abandoned. There was no torture to extract a

confession, nor was the culprit tortured previous to his execution, and the person accused of theological offences appears to have been tried before the ordinary tribunals with the ordinary safeguards against an improper conviction. Nor did Moses prescribe a slow or painful mode of execution. Crucifixion was not a Jewish punishment. It was borrowed from the heathen and inflicted in Judea under the Roman authority. The cruelties that we sometimes read of in the Old Testament were not prescribed by the law of Moses, but adopted in spite of it. Stoning was, no doubt, not a painless kind of death, but it will compare favourably with methods adopted by civilised countries almost in our own time. Moses would have condemned the methods and punishments adopted by the Holy Inquisition. Nor did Moses—at least as a rule—extend these theocratic punishments to any people except the Israelites. Strangers residing in Palestine—or it would seem descendants of the Canaanites, many of whom were left—were not punished for offences against religion. Until lately we punished offences against religion as severely as Moses did, and we also punished with great severity offences against the Crown which found no place under the Mosaic theocracy. For high treason we sentenced men to be hanged, drawn and quartered within living memory. Moses would have regarded such a punishment as barbarous. But as the theocratic principle has long been obsolete, I shall not deal further with the methods by which Moses enforced it.

The origin of the Mosaic code is indicated in the eighteenth chapter of the book of Exodus, and this origin seems a very natural and probable one. Jethro, the father-in-law of Moses, having heard of his triumphant passage through the Red Sea, came to visit him. He found Moses acting as judge in all the causes which arose among his numerous followers, with the result that almost all his time was occupied in hearing and deciding these causes, while not-

withstanding all his efforts the suitors were often delayed. He advised Moses to appoint a number of subordinate judges, who might refer any matters of importance to him while they decided minor causes themselves. Moses adopted this advice, and it became necessary for him to give directions to these inferior judges as to the principles on which they were to act in dispensing justice. In many places what is regarded as the law of Moses manifestly consists of directions of this character. For example, it can hardly be doubted that such rules as "Thou shalt take no gift: for a gift blindeth them that have sight and perverteth the words of the righteous,"¹ were addressed not to the people generally, but to the subordinate judges. Indeed, we find this stated (in substance) in the book of Deuteronomy. I say nothing as to the Divine origin of this law; but it seems clear that Moses judged causes, and even appointed subordinate judges, before there was any revelation on the subject. And it may be presumed that he continued to adhere to the law by which he had been previously guided, except in so far as he considered it altered by revelation.

That Moses himself laid down the law in the condition in which we now find it, is, I think, improbable. Not only are moral precepts, religious rites, Civil law and Criminal law, mixed up together and interspersed with historical narratives, but there is an amount of repetition which will suggest to most persons that the compiler of the present books used two or three earlier reports of the Law of Moses. But the very fact of the repetition suggests that these reports were in substantial agreement with each other. And at this early stage of legislation we cannot expect to find the marked lines of distinction which are to be met with in modern treatises. Moral precepts, Criminal law and Civil law, had still to be differentiated, and these topics were probably mixed in the original work of Moses (if he committed his laws to writing),

¹ *Exodus* xxiii, 8.

as well as in the report or reports of his laws which have come down to us in the Pentateuch. We need not expect to find the analysis made in the Pentateuch. We have to make it.

I think, however, that the punishments which we meet with in the Criminal law of Moses go far to indicate that it is the work of the great leader whose name it bears. They are such punishments as are suited to a community travelling in the wilderness. There is no imprisonment in the law of Moses, because there were no prisons in the wilderness, and the Israelites had no fixed location there. There is no penal servitude, such as exists with us; though for certain offences the criminal might become a slave under the ordinary conditions of slavery. A criminal could only be punished in his body or his property. Of bodily punishments there were but two—death and flogging: and as money was probably almost unknown in such a community as the Israelites in the time of Moses, fines were made payable in kind, not in money. I need hardly point out that simple restitution is not punishment. If a man steals a pound from me and I accept the pound in return and abstain from prosecution, I am not treating him as a thief but as a borrower. I am not inflicting any punishment on him for his theft. But if I make him pay two pounds for the pound which he has stolen, I am punishing him by a fine of one pound. This is the principle of much of the Mosaic legislation. The thief was punished by compelling him to restore *more* than he took. But when money was little used and payment was made in kind, this multiple restitution was absolutely necessary in order to indemnify the sufferer. If the man who stole a sheep was only bound to restore a sheep, he would probably go on for the rest of his life stealing good sheep and restoring bad ones. The amount added was different in different cases, but in no instance was simple restitution regarded as sufficient. The injured person, not the State,

got the benefit of these fines, but so far as the criminal was concerned the punishment was the same: and if the thief failed to pay the fine, he was liable, at least in many cases, to be reduced to slavery. This is an anticipation of our modern system of fines with the alternative of imprisonment. But slavery with an Israelite was always of limited duration. Every Israelite in slavery, whether voluntary or involuntary, was at certain seasons to be set free.

The Israelites had no police, and the trial seems in all cases to have been before a single judge from whose decision there was no appeal. But the death sentence at least was to be carried out by the people—they were all to stone the convict with stones until he died. It may be presumed that if public opinion did not affirm the decision, no stoning would take place—at least, until the time of the Kings, when persons in the employment of the monarch would no doubt be ready to carry out such sentences as that passed on Naboth the Jezreelite. For a breach of the fifth commandment, however, no judicial tribunal seems to have been required. The parents of the rebellious son brought him before the elders of the city and made their complaint, on which he was to be stoned. But it will be noticed that in this and other cases there is no penalty for refusing to stone a person who had been condemned to that punishment: and no doubt it would be only in very extreme cases that parents would prefer such a charge against their son. There seems to have been no machinery for carrying out any sentence except an appeal to the public. I may, however, notice that in cases of murder the execution of justice was entrusted to a relative of the deceased man, known as “the avenger of blood,” who seems to have been empowered to kill the murderer without any trial; and also that Moses in some exceptional cases directed the culprit to be burnt alive—but this sentence seems also to have been left to the public to be carried out, and the prisoner would probably

escape unless popular opinion was in favour of the judge's decision. A sentence to be carried out by the public must always be largely dependent on public opinion.

One provision of the law of Moses—though there may be some doubt as to whether it was limited to capital cases or universal in its extent—was that which required the testimony of two or three witnesses for a conviction. If the judge neglected this provision the public would probably have refused to carry out his sentence. And in these primitive times what is now called circumstantial evidence was probably unknown. I find no trace of it in the *Bible*. Two or three witnesses were required to swear that they had seen the offence committed; though probably in a case of robbery it would suffice for two or three witnesses to swear that the goods which were found in the possession of A. belonged to B. I do not find in the Mosaic law, or in the *Bible* generally, any trace of witnesses for the defence. Two or three witnesses for the prosecution swearing to the fact, not to some suspicious circumstances, were considered sufficient. And this is perhaps the reason why the Mosaic law contains no prohibition of false swearing in favour of one's neighbour, and no punishment for false swearing, unless against him. Modern theologians turn and twist the Commandments of the Decalogue in a manner that in all probability Moses never dreamt of. That the ninth commandment only applied to giving false testimony *against* one's neighbour is clear from the punishment which Moses attached to the violation of it. The perjurer was to undergo the punishment which he sought to bring upon his innocent neighbour by his perjury. This is a much more rational rule than that of the English law, under which murder by perjury—the worst kind of murder—is only punishable by a term of penal servitude, though the penalty for all other kinds of murder is death. But the reason why Moses

imposed no penalty on giving false evidence in favour of one's neighbour, and did not even forbid such evidence, was probably that under the Mosaic law evidence in favour of the prisoner was inadmissible. The prisoner seems to have been allowed to speak for himself, but his real security lay in the necessity of having two or three witnesses to give direct testimony against him, together with the fact that the carrying out of the sentence was so largely left to the public.

Turning now to the part of the Decalogue which deals with crimes as distinct from religious offences, persistent breaches of the fifth commandment were punishable by death, but only in case both parents claimed the infliction of the penalty. No duty was imposed on any one else with regard to the prosecution or infliction, and even with the parents it was not a duty but a power. 'This power, I may remark, explains some passages in the Proverbs of Solomon on which the advocates of flogging young people lay great stress. Solomon writes, "Withhold not correction from the child: for if thou beat him with the rod *he shall not die*. Thou shalt beat him with the rod, and shalt deliver his soul *from the grave*"¹ (see marginal reading); and again, "Chasten thy son, seeing there is hope, and *set not thy heart on causing him to die*"² (I again adopt the marginal reading of the R. V.). Beat your son, says Solomon, instead of bringing him before the elders of the city and asking to have him stoned. Solomon could not interfere with the law of Moses, but he urges parents not to avail themselves of the stringency of its provisions as regards disobedient children. Passing on to the sixth commandment, the "avenger of blood" could slay the manslayer wherever he found him, unless he fled to one of the cities of refuge; but even there he was not safe unless the crime was reducible to manslaughter. (The English

¹ Prov. xxiii, 13, 14.

² Prov. xix, 18.

translators of these books ought not to have substituted "Thou shalt do no murder" for "thou shalt not kill"; but they were probably unaware of the niceties of the English law of murder). Death by stoning was also the penalty for breaches of the seventh commandment—at least by the woman; but no obligation seems to have been cast on any one to carry it out. The narrative of the woman taken in adultery in the Gospel of St. John illustrates this. Though probably not written by John himself, this passage is of early date, and was of such a nature as to convey nothing incredible to the Jews. That the woman's fate might have depended on the words of Christ was quite possible, owing to the fact that the Mosaic law did not enjoin anybody to cast the first stone. Breaches of the eighth commandment were not punishable by death or stripes. Multiple restitution was the penalty enforced, and if the thief could not make it he was for a time reduced to slavery. But the conditions of slavery, when the slave was a Hebrew, were not severe. One form of theft, however, was punishable by death—man-stealing. This seems to have meant stealing a Hebrew man (or child) and selling him into slavery; for stealing a Gentile or a slave would apparently have come under a different head. Breaches of the ninth commandment were punished by inflicting on the culprit the same penalty which he sought to bring on another by his false evidence; while breaches of the tenth commandment were not crimes and did not involve any punishment.

After giving all reasonable extensions to the sixth and eighth commandments, however, there remain two large classes of criminal offences—recognised as such by Moses as well as ourselves—which are not dealt with in the Decalogue. The first of these is assaults not resulting in, or aiming at, death; and the second is malicious injuries to property which, as the perpetrator gains nothing by

them, cannot be brought under the head of dishonesty. To the first of these Moses applied the same principle as to murder, *viz.*, retaliation—"an eye for an eye, a tooth for a tooth, wounding for wounding, stripe for stripe." The analogy between this principle and that of restitution in the case of stolen property will at once strike the reader; but there was this difference, that retaliation was always simple, while restitution was always multiple, except in some cases that belong rather to the Civil than to the Criminal law. Now this principle of simple retaliation was probably in the days of Moses a change in the direction of leniency; and even still, in the parts of our Statute law in which the retaliation principle is adopted, the sentences passed often consist of multiple retaliation—of giving the offender much more than he gave. But I do not think that Moses ever spoke of retaliation as the proper punishment under all circumstances and in all ages for what we now call crimes of violence. He found it a good rule to adopt—especially with a view to preventing excessive punishments—among a people situated as the Israelites were in the Wilderness and even in the land of Canaan. It was a rough-and-ready rule for establishing among a primitive people a system of punishments which were likely to prove deterrent without being unduly severe; but the meaning which it conveyed to most people in the days of Moses probably was, "Don't take two eyes for one eye or a dozen teeth for one tooth." The principle, however, was not applied in its strict literal sense in the Mosaic code any more than in our own. The ordinary punishment for crimes of violence consisted of stripes; and here Moses imposed another restriction on excessive punishment. Forty stripes was not to be exceeded "lest thy brother should appear vile unto thee." And as the Jews understood it, this rule was not to be evaded by using a whip with several lashes instead of one with a single lash. The punishment was in fact usually

inflicted with a three-corded whip when the number of strokes was limited to thirteen, because fourteen strokes would mean forty-two stripes. Forty stripes thus became in practice "forty stripes save one." I need hardly say that this number is still often exceeded in practice in this country; and it may be added that the reason "lest thy brother should appear vile unto thee," is in such cases wholly disregarded. Moses was more humane than many Christians in this twentieth century—just as Solomon was more humane than many of those who profess to follow his precepts. The narrative of Solomon's life, however, indicates that he was a man of harsher temperament than Moses. If the story of Joseph is from the pen of Moses, the Jewish legislator was a man of a very different type from what many persons think. The writer's admiration for Joseph is manifest in every line of it, and it could hardly have been written by one who had not himself felt the sentiments which he describes.

The Civil law of Moses will, I think, be found in general just and well suited to a primitive people who require clear and simple rules for their guidance. The land laws form an important part of it, and I think his system may be described as one of peasant proprietors. But in the Wilderness there was not much opportunity for enforcing a system of land laws. We have a curse on the man who removes his neighbour's land-mark (so needlessly repeated now when the offence in question has become almost impossible), and we have his decision in the case of the daughters of Zelophehad. But land seems to have been held in fee simple, leaseholds being unknown, and each occupant managed his own farm. He could sell it but apparently not dispose of it by will. It descended to his sons if he did not dispose of it in his life-time. But even from the first the distribution of land seems to have been uneven, and we sometimes read of men having

great possessions, like Barzillai, who maintained David's whole army for a time. The laws however, though simple and equitable, are suited only to an agricultural and pastoral community. Our credit system would have been an abomination to Moses. Israelites were forbidden to charge each other with interest, though they might charge it on loans to Gentiles—a permission of which they have availed themselves pretty largely. Commerce may be said to have no place in these laws, and shipping is not mentioned even once. Nor are horses; for at this time the Israelites had no horses. Even the fourth commandment contains no prohibition to using one's horse on the Sabbath Day. The reason is no doubt that the Ten Commandments were given to people who had no horses. The same omission may be noted in the tenth commandment.

But there is one feature of the Mosaic code which from the modern point of view requires special notice—his sanitary legislation. This subject seems to have received little attention from other early legislators, but with Moses it occupies a high place. The adage, "Cleanliness is next to godliness," might have originated with him, for his rules of cleanliness are described as enjoined by Divine command. No doubt his legislation on the subject is not twentieth-century legislation; but can any reasonable man doubt that it had a considerable effect in checking the progress of infectious and contagious diseases? Moses is the pioneer of this kind of legislation, and a century since it was badly wanted in England.

To sum up: The Criminal law of Moses was milder than that of England in the year 1836. If he punished some offences against religion with death, it was not a death of torture, and probably during the whole period of Jewish independence the sufferers were not as numerous as in the single reign of Philip II of Spain. Crucifixion,

for instance, was not a Mosaic punishment, but one derived from the Gentiles. His Civil law was clear and equitable, though dealing only with an agricultural or pastoral community, having little commerce and hardly any shipping: and his sanitary legislation was greatly in advance of the time, especially if we consider that he was not laying down laws for citizens of a great city in which the ill-consequences of the neglect of all sanitary precautions were certain to make themselves felt, but chiefly for a rural population. It is not a law which it would be desirable to revive in the present century, and was never intended for a country like England, consisting to a great extent of large towns, and largely dependent on its commerce and its shipping: and the process sometimes adopted of picking out some special provision—the *lex talionis* according to some, and restitution according to others—and asking us to accept this provision as of Divine origin, while the other provisions which claim the same origin are quietly left on the shelf, seems to me wholly indefensible. We cannot accept the Mosaic code as a whole: and if we are to commence a process of picking and choosing, we should be guided by all the lights of the present century in making our selection. This or that principle should not be imposed on us as of Divine authority, unless we either accept the whole or can find grounds for drawing the distinction in the terms of the legislation itself. But unfortunately neither of these courses has been taken.

LEX.

II.—RAILWAY PASSENGERS' PERSONAL LUGGAGE.

THE travelling public and the railway companies have on many occasions come into conflict as to what is actually included under this term, but articles of clothing,

articles to be worn, and articles of toilet are apparently covered by it. It has always been recognised that the Carriers Act 1830,¹ ss. 1 and 2, applies to personal luggage as to other goods, and that if valuables—jewellery, dresses, sealskins, etc.—be taken exceeding £10 in value, and these are lost when being carried as personal luggage, then the Act protects the railway company, and they are not liable for the loss unless the nature and value of the goods have been declared. In the most recent case on the subject, *Casswell v. Cheshire Lines Committee*,² which was an appeal from a County Court heard before a Divisional Court of the King's Bench Division on May 31 and June 3, 1907, the facts were the plaintiff was a passenger over the railway managed by the defendants, and took with him a box which, by the regulations of the defendants, he was entitled to have carried free of charge. The box was placed in the luggage van and lost, and the action was brought to recover damages. The defendants pleaded as a special defence sect. 1 of the Carriers Act, which they maintained exempted them from liability for the loss of certain articles contained in the box, consisting of silver-backed brushes and combs, trinkets, jewellery and other articles (amounting altogether to over £10), as no declaration of the value of such articles had been made nor had any charge been paid in respect thereof. The County Court Judge found as a fact that all the articles in question fell within the term personal luggage such as a passenger was entitled, by their regulations, to have carried free of charge, and he held that the Carriers Act had no application to such ordinary personal luggage. He therefore gave judgment for the plaintiff. The defendants, the railway company, appealed, and it was argued that as passengers are entitled to have a certain weight of luggage carried free, and that in the company's time-tables (which formed part of the contract) it was stated that a certain weight of personal

¹ 11 Geo. IV & 1 Will. IV, c. 68.

² *W. N.*, June 8, 1907.

luggage might be carried free, there was a special contract which precluded the Company from making any charge for any goods properly described as personal luggage, and that the special contract took the case out of the Act; and the Court (Darling and A. T. Lawrence, JJ.) allowed the appeal, holding that, although the regulation of the railway companies amounted to a special contract to carry a certain amount of ordinary personal luggage with the passenger free of charge, and the companies could therefore make no charge in respect of that luggage, nevertheless the Carriers Act afforded a defence to a claim for the loss of such articles contained in the luggage as were within the category of sect. 1 of that Act. The scheme of the Act was to protect carriers from claims for the loss of articles there enumerated, unless a declaration of their value had been made and a higher rate paid for their carriage, and neither the special contract, nor the special Acts under which the railway companies were compelled to carry a certain amount of personal luggage free of charge, over-rode those provisions in the Carriers Act. The defendants therefore were bound to carry free of charge the particular articles in question, as they were part of the plaintiff's ordinary luggage; but as he had not made a declaration of their value and paid any rate of charge in respect of them, the Carriers Act protected the defendants from any liability for their loss. It may be pointed out that the decision of the County Court Judge appears to be directly in conflict with the decision of the Court of Exchequer in *Flowers v. South-Eastern Railway*.¹ In this case the plaintiff sued the defendants, a railway company, for the loss of his wife's luggage upon a journey from Redhill to Charing Cross. As to certain articles contained in the luggage, which consisted of plaintiff's own clothes, the defendants pleaded that they were the Company incorporated by a

¹ [1867] 16 L. T. R., 329.

certain Act for making a railway from the London & Croydon Railway to Dover, to be called the South-Eastern Railway, and that the plaintiff's wife was a passenger to be carried upon the defendants' railway, which was the railway mentioned in the 131st section of the said Act, from Redhill to London, and the articles in question were delivered to the defendants as the luggage of the plaintiff's wife, to be carried without extra charge upon the said railway with the plaintiff's wife as a passenger upon the said railway, within the meaning of the section, and were not articles of clothing of the plaintiff's wife within the meaning of the said section, and that they were lost while being carried on the said journey upon the said railway with the plaintiff's wife as such passenger aforesaid. The journey from Redhill to London is performed partly upon the line constructed under the special Act upon which the plea was founded, and partly upon other lines not so constructed. No evidence was given to show at what part of the journey the loss took place. It was held that the plea was not proved. The Court held they were bound by the decision of the Court of Queen's Bench in *Wood v. The Metropolitan Railway Company* (unreported).

In *Morritt v. North Eastern Railway Co.*,¹ the plaintiff was a passenger by the defendants' railway from York to Darlington, and had with him two water-colour drawings, tied by a rope face to face. They were above the value of £10, but he made no declaration of their value. He handed them to the guard, asking him to take care of them, and saw them labelled "Darlington." When the train reached Darlington, the plaintiff alighted, took a fresh ticket to Barnard Castle, and told the porter to see that the drawings were taken out and put into the Barnard Castle train. The drawings, however, were not taken out, but were carried on to Durham, and when they were recovered by the

¹ L. R. [1876], 1 Q. B. D. 302.

plaintiff had sustained considerable injury. The question was; whether the Carriers Act applied to the case of goods *negligently carried beyond the point of destination*, so as to protect the railway company, and it was held by the Queen's Bench Division that it did, so that the plaintiff was not entitled to recover for the damage to the drawings. The plaintiff appealed, but the Court of Appeal (James, Mellish, L.JJ., and Baggallay, J.A., Cleasby, B., and Grove, J.) held, affirming the judgment of the Queen's Bench Division, that the construction put by Blackburn and Field, JJ., on the Carriers Act was correct. The leading case was followed in *Miller v. Brasch*.¹ In this case the plaintiff delivered to the defendants, who were carriers from London to Rome, a trunk containing silks and sealskins worth £40, no value being declared, for Italy. Somehow they made a mistake between the plaintiff's trunk and a case of Christmas cards consigned to somebody at New York, sending the silks and seal skins to America and the Christmas cards to Italy. The carriers claimed the protection of the Carriers Act; but the plaintiff contended that they were not entitled to it, because they were wrongdoers in having sent the trunk on the wrong road, and not on the journey contracted for. To this objection, however, *Morrill v. The North Eastern Railway Company* was held to be a conclusive answer. It was also held that the carrier was not deprived of the protection of the Act by the fact that the loss of the goods was temporary and not permanent, and that the plaintiff was not entitled—on this point the Court of Appeal reversing the decision of the Court below—to recover as damages the cost of the re-purchase of other articles at Rome at enhanced prices in place of those temporarily lost. Most litigation has arisen over that part of the section specifying the “articles of great value in small compass.” Painted carpet designs are not “paintings”

¹ L. R. [1882], 10 Q. B. D. 142.

(*Woodward v. L. & N. W. Ry. Co.*¹). Hat-bodies made partly of fur and partly of wool are not "furs" (*Mayhew v. Nelson*²). German silver fuzee-boxes are not "trinkets" (*Bernstein v. Baxendale*³). But a chronometer is a "time-piece" (*Le Conteur v. L. & S. W. Ry. Co.*⁴). The word "writings," it has been held in a County Court case (*Lawson v. London & S. W. Ry. Co.*⁵), will include the manuscript of an author. In "pictures" frames are included, (*Henderson v. L. & N. W. Ry. Co.*⁶). A packed waggon containing articles of the specified kind and put on a truck, is a "parcel or package" within the section (*Whaite v. Lanc. & Yorks. Ry. Co.*⁷). The declaration of the value and nature of the goods must be made at the time of delivery, whether that be at the carriers' office, at the sender's house, on the road, or elsewhere (*Baxendale v. Hart*⁸). In *Bunch v. Great Western Railway Co.*,⁹ the plaintiff arrived at Paddington, more than half-an-hour before the train was timed to start, and entrusted to a porter, on his assurance that it would be quite safe in his custody, a Gladstone bag, which she expressed a wish to have in the carriage with her. She then went away for ten minutes to meet her husband on the premises of the company, and to get a ticket. When she returned, the bag, which had not been put into the carriage at all, was missing. It was held by the House of Lords (Halsbury, L.C., and Lords Watson, Herschell, and Macnaghten: Lord Bramwell *dissenting*), that the Great Western Railway Company were liable, and that a railway company accepting passengers' luggage *to be carried in a carriage with the passenger*, enter into a contract as *common carriers, subject to this modification*, that in respect of his interference with their exclusive control of his

¹ [1878], 3 Ex. Div. 121.

² [1859], 6 C. B., N. S., 251.

³ *Law Times*, June 24, 1882.

⁴ L. R. [1874], 9 Ex. 67.

⁵ L. R. [1888], 13 App. Cas. 31.

⁶ [1833], 6 C. & P. 58.

⁷ L. R. [1865], 1 Q. B. 54.

⁸ L. R. [1870], 5 Ex. 90.

⁹ [1851], 6 Ex. 769.

luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. The result of this case is to disapprove the reasoning in *Berghem v. Great Eastern Railway Co.*,¹ and to approve that of *Richards v. London, Brighton & South Coast Railway Co.*;² *Talley v. Great Western Railway Co.*;³ *Butcher v. London & South Western Railway Company*;⁴ and to decide that, in the absence of contributory negligence on the part of the passenger, railway companies are insurers of luggage carried in the traveller's own compartment, as well as of that carried in the van. "Personal luggage" has been defined to mean "whatever the traveller takes with him for his personal use and convenience, according to the habits and wants of his class, either with reference to the immediate necessities, or to the ultimate purpose of his journey" (*Macrow v. Great Western Railway Co.*).⁵ The following have been held not to be personal luggage: the bedding which a man is carrying with a view to the time when he shall have provided himself with a home (*Macrow v. Great Western Railway Co.*);⁶ the sketches of an artist (*Mytton v. Mid. Ry. Co.*);⁷ the title-deeds of a client which a solicitor is taking to produce at a trial (*Phelps v. L. & N. W. Ry. Co.*);⁸ a bicycle (*Britten v. G. N. Ry. Co.*);⁹ and a toy rocking-horse (*Hudston v. Midland Ry. Co.*).¹⁰ As regards luggage left on a platform, even though a porter has taken charge of it, there seems to be a little doubt. It was held in *Agrell v. L. & N. W. Ry. Co.*, printed in a note to *Leach v. S. E. Ry. Co.*,¹¹ that the railway company were not liable for the loss of a portmanteau which an intending passenger from Manchester to Hull gave to a porter on arriving in a cab at the Manchester

¹ [1878], 3 C. P. D. 221.² L. R. [1870], 6 C. P. 44.³ L. R. [1871], 6 Q. B. 212.⁴ [1859], 4 H. & N. 615.⁵ L. R. [1899], 1 Q. B. 243.⁶ [1849], 7 C. B. 839.⁷ [1855], 16 C. B. 13.⁸ Cited *supra*.⁹ [1865], 19 C. B., N. S., 321.¹⁰ L. R. [1869], 4 Q. B. 366.¹¹ [1876], 34 L. T. 134.

Station. The Court seems to have thought that if, on arriving at the station, the traveller had said "Hull," and the porter had replied "All right," the company would have then been responsible; and indeed this point would seem to be clear from the case of *Lovell v. London, Chatham & Dover Railway*.¹ See also *Welch v. L. & N. W. Ry. Co.*² It was held in a modern case (in which a lady's maid coming from Malvern lost her box at Paddington) that, in regard to a passenger's luggage on the trains arriving at the station he gets out at, it is the company's duty to have the luggage ready at the usual place of delivery, while it is the passenger's duty to remove it within a reasonable time (*Patscheider v. G. W. Ry. Co.*³). See also *Frith v. N. E. Ry. Co.*⁴ In *Hodkinson v. L. & N. W. Ry. Co.*⁵ the plaintiff arrived at a station of the defendants (Ashton-under-Lyne), and one of the company's porters took her luggage, contained in two boxes, from the van. 'The porter asked the plaintiff if he should engage a cab for her. In reply she said she would walk to her destination, and would leave her luggage at the station for a short time, and send for it. The porter said "All right, I'll put them on one side and take care of them," whereupon the plaintiff quitted the station. One of the boxes was lost. Held by Coleridge, C.J., and Cave, J., that the transaction amounted to a delivery of the luggage by the company to the plaintiff, and a re-delivery of it by her to the porter as her agent to take care of, and that consequently the company were not responsible for the loss.

As regards articles deposited at the cloak-room, a railway company's rights and liabilities are those of common carriers, and not merely those of warehousemen (see *Singer Manufacturing Co. v. L. & S. W. Ry. Co.*; ⁶ and see sect. 2 of the Railway & Canal Traffic Act, 1854).⁷ Railway companies

¹ [1876], 45 L. J., Q. B. 476.

² L. R. [1878], 3 Ex. D. 153.

³ [1884], 14 Q. B. D. 228.

⁴ [1885], 34 W. R. 166.

⁵ [1888], 36 W. R. 467.

⁶ L. R. [1894], 1 Q. B. 833.

⁷ 17 & 18 Vict., c. 31.

are in the habit of attempting to vary the ordinary contract of bailment by issuing tickets containing conditions. If the passenger reads the conditions and makes no objection, he will, of course, be bound by them; and so he will if he is aware that there are conditions and does not take the trouble to look at them, or thinks it better not to (*Harris v. G. W. Ry. Co.*¹; and see *Acton v. Castle Mail Packets Co.*,² and *Duckworth v. L. & Y. Ry. Co.*³) But generally he will not be bound by the conditions if he did not read them and was not aware of their existence. (*Parker v. S. E. Ry. Co.*; ⁴ *Henderson v. Stevenson*; ⁵ *Richardson v. Rowntree.*⁶) When the plaintiff had delivered to the defendant a waggonette to be sold, and had taken from him a printed form containing a receipt for the waggonette, followed by the words, *subject to the conditions as exhibited upon the premises*, the plaintiff was held to be bound by the conditions, though he had put the document into his pocket without looking at it (*Watkins v. Rymill*,⁷ and see *Woodgate v. G. W. Ry. Co.*⁸). A railway company is only liable for passengers' luggage to the person travelling with it, although it may not be really his property (see *Meux v. G. E. Ry. Co.*⁹): where it was held that a servant's livery, although the property of his master, is the servant's personal luggage when he is a passenger by a railway. Thus, a man sending on his luggage by a servant cannot sue for its loss (*Bechu v. G. E. Ry. Co.*¹⁰). So it is immaterial who paid the fare; a servant, for instance, can sue for loss of luggage though the ticket was taken by his master (*Marshall v. York, &c., Ry. Co.*,¹¹ and see *Austin v. G. W. Ry. Co.*¹²). Companies sometimes issue tickets stating that they will not be responsible for loss or injury arising "off their own lines." In order to escape liability, a railway company

¹ L. R. [1876], 1 Q. B. D. 515.

⁸ [1901], 84 L. T. 774.

⁶ L. R. [1875], 2 H. L. Sc. 470.

⁷ L. R. [1883], 10 Q. B. D. 178.

⁹ L. R. [1895], 2 Q. B. 387.

¹¹ [1851], 11 C. B. 655.

² [1896], 73 L. T. 158.

⁴ [1876], 2. C. P. D. 416.

³ L. R. [1894], A. C. 217.

⁸ [1884], 51 L. T. 826.

¹⁰ L. R. [1870], 5 Q. B. 241.

¹² L. R. [1867], 2 Q. B. 442.

must show that the luggage, when lost, was *out of their custody*; so that if it is lost at a station which they have the use of, by agreement, with another company, they will not be protected (*Kent v. Mid. Ry. Co.*¹). In *Hooper v. L. & N. W. Ry. Co.*,² the plaintiff had taken a G. W. through ticket from Stourbridge to Euston, changing at Birmingham into a train of the defendants. He saw his portmanteau transferred from the G. W. to the L. & N. W. train, but at Euston it was missing. Notwithstanding that his contract was with the Great Western Railway Company, he was held entitled to sue the London & North Western Railway Company as for a breach of duty. This case was decided on the authority of *Foulkes v. Met. Ry. Co.*,³ and disregarding *Mytton v. Mid. Ry. Co.*⁴ as an authority. See also *Elliott v. Hall*.⁵

G. ADDISON SMITH.

III.—THE ‘LIABILITY OF JUSTICES OF THE PEACE.

THE office of Justice of the Peace⁶ has been built up piecemeal for convenience, and not with any idea of producing a scientific creation capable of legal classification. At a very early date freeholders were elected in each county to render assistance to the sheriff in preserving the king’s peace, and out of this subordinate function has arisen the great office of Justice of the Peace as we find it at the present day. A good illustration of the difference between peace powers and judicial powers is to be gathered from the case of *Groenvelt v. Burwell*.⁷ Holt, C.J., there says

¹ L. R. [1874], 10 Q. B. 1.

² [1880], 50 L. J., Q. B. 103.

³ [1880], 5 C. P. D. 157.

⁴ [1859], 28 L. J., Ex. 398.

⁵ L. R. [1885], 15 Q. B. D. 315.

⁶ Metropolitan Police magistrates, stipendiary magistrates, and county and borough justices, are all included under this denomination, as they are all similarly appointed and possess the same status.

⁷ 1 Salk, 396.

that the judicial power is the power to "examine, convict, and punish," and by way of contrast the powers of the police constable are referred to, which officer, possessing the power of arrest for a breach of the peace committed in his presence, is yet liable to an action for damages, however honestly he may have acted, if it can be proved that no breach of the peace took place. For the power of the constable is a ministerial one, to bring the offender into safe custody simply, and not a judicial one to punish for the alleged offence.

The accretions of centuries have made the justice-of-the-peace-ship a diversified office, comprising judicial, discretionary, and ministerial functions. It has become eminent both as a constitutional institution in the broader sense, and also as a purely judicial office, and it may safely be asserted that so far reaching has been its sphere of usefulness, that, although its judicial functions have steadily expanded, the constitutional and general importance of the office equals its status as a legal tribunal. "The whole christian world," says Lord Coke, "hath not the like office as justice of the peace, if duly executed." Many of its discretionary, or administrative, functions have indeed been transferred to local authorities by the Municipal Corporations Act 1882 and the Local Government Acts 1888 and 1894, showing thus a tendency to make it a more judicial office, but, even now, the multitude of its duties invest it with peculiar legal properties which cause it to diverge considerably from the purely judicial offices, necessitating a consideration *ad hoc* of the legal liabilities of those who exercise its varied functions.

It was in its inception a lay public office rather than a judicial one. Its lay character appears from the two statutes which transferred to the crown the power of appointing justices of the peace, and first conferred upon them their present title. The earlier one¹ runs as follows:

¹ 1 Edw. III, St. 2, c. 16.

“Item for the better keeping and maintenance of the peace the king will, that in every county good men and lawful, which be no maintainors of evil or barrators in the county, shall be assigned to keep the peace.” It was not requisite that these “good men and lawful” should possess any legal training or experience. The same thing is observable to some extent in the later statute,¹ which empowered the king to appoint “one lord and three or four of the most worthy men of the county *with some learned in the law*” to the office, and conferred upon them limited judicial powers in addition to their peace duties.

Both the non-judicial and the judicial functions have grown apace since those early days, but the former have always been of sufficient importance to stand out in juxtaposition with the latter, thereby hindering the office from acquiring an exclusively judicial character. The concurrent existence of these two functions, the lay and the judicial, has preserved the distinction between the liability of justices of the peace in respect of judicial and non-judicial functions—a distinction which does not exist in the case of judges of record, nor, presumably, in the case of purely judicial officers not of record, whose ministerial duties are confined to acts incidental to their judicial functions. Following the ordinary rule as to judicial officers not of record, justices of the peace were not liable in respect of their judicial acts, so long as they kept within the limits of their jurisdiction and acted in good faith,² and, following the ordinary rule as to the liability of public ministerial officers, they were held to be liable in respect of their ministerial acts for honest mistake simply.³ The judgment of Sir Barnes Peacock in *Brasyer v. Maclean*⁴ makes it clear that the public ministerial officer is liable to an action for damages for misfeasance in the discharge of his duties, without proof of

¹ 34 Edw. III. c. 1.

² *Taylor v. Nesfield*, 3 El. & Bl. 724.

³ *Linford v. Fitzroy*, 13 Q. B. 240.

⁴ L. R., 6 P. C. 398.

malice or absence of reasonable or probable cause. The office of sheriff furnishes a specific instance of this rule. A sheriff, in levying execution, is liable for negligence simply even without any improper motive.¹ The case of the sheriff is an interesting one to notice as it is, like that of the justice of the peace, an office with double functions, with this difference, that whilst the latter office has become more judicial and less ministerial, the former has shown an opposite development. When, however, a ministerial act is performed in accordance with a valid judicial order, no liability attaches to a ministerial officer performing it so long as he acts *bonâ fide*.²

Having regard to the history of the subject, it is not surprising that questions should have arisen as to the legal status of justices' Courts and the judicial position of its judges, and have been the cause of much discussion and of diverse views; questions to which time and mutation, rather than a free and unfettered consideration of the legal principles in them, have furnished replies, leaving now nothing unsettled save remote theories suitable only for academic discussion. For instance, the distinction between judicial and ministerial acts which has been in part already referred to: Another subject upon which discussion has been intermittently kept up is, whether a justice's Court is a Court of record or not. Quarter Sessions, it is well settled, is a Court of record³ but Petty Sessions is not.

It has been, at times, felt by many that the two statutes of Edward III did not confer upon the Crown a new power, but were merely declaratory of its prerogative rights as the fountain of justice and creator of legal jurisdictions:⁴

¹ *Smith v. Pritchard*, 8 C. B. 588. ² See *Ashcroft v. Bourne*, 3 B. & Ad. 684.

³ *In re Pater*, 33 L. J., M. C. 142.

⁴ It is the Court that decides the status of the judge, except in the case of a High Court judge, who has a personal status and who even acting in a Court not of record is always fully protected (*Taaffe v. Downes*, 3 Moo. P. C. 36 n, per Fox, J.). Presumably, however, a coroner would not enjoy the same measure of protection when acting in any other judicial capacity in a Court not of record.

that the justices' Court was a prerogative office of a minor character, and therefore a Court of record as to all records made by it. This idea is strengthened by the wording of the statute, 27 Hen. VIII, c. 24, which, associating in imposing terms justices of the peace with justices in eyre, justices of assize, and justices of gaol delivery, enacts that all such officers and ministers shall be appointed by the Crown alone. Bearing in mind the character and aims of the monarch in whose reign the statute was passed, it seems highly probable that Henry VIII intended to claim the appointment of justices of the peace to be as much a part of the prerogative as the appointment of judges of the ancient Courts *coram rege*.

There does exist, doubtless, some scintilla of the prerogative about the appointment of justices of the peace, but the trend of legal opinion has proved too strong for the higher claim.¹ With the advent of the Summary Jurisdiction Act 1848, this claim was renewed once more by Mr. Paley² and other learned authors, only to be met with the same absence of practical success.³ The fact is that this great institution, though partly associated with the royal prerogative, is to a still greater extent a statutory office dependent upon statute for its powers, and, unlike the modern County Courts created by the County Courts Act 1845, they have not been made by statute Courts of Record.

We shall refer later to certain acts of justices which are of record, but even these, though made, are not preserved by the Court which makes them, but are either forwarded to Quarter Sessions⁴ or are handed to the parties⁵ in the

¹ In *Gregory's Case*, 6 Rep., at 20b, the Justices' Court does not appear in the very considerable list of minor Courts of record there mentioned.

² Paley's *Summary Convictions*, 7th Ed., p. 168 n.

³ See *Linford v. Fitzroy* [1849], 13 Q. B. 240; *Taylor v. Nesfield* [1854], 3 El. & Bl. 724; *Gelen v. Hall* [1857], 2 H. & N. 379. These cases establish the liability in law of justices for acts done with malice, which proves beyond a doubt that Justices' Courts cannot be Courts of Record (*Kemp v. Neville*, 10 C. B., N. S., 523).

⁴ See 11 & 12 Vict., c. 43, s. 14, and 42 & 43 Vict., c. 49, s. 27.

⁵ See 11 & 12 Vict., c. 43, s. 14, and 24 & 25 Vict., c. 100, ss. 44 and 45.

proceedings, whereas, in the words of Blackstone,¹ a Court of Record is one whereof the acts and judicial proceedings are enrolled for a perpetual testimony.

A Court of Petty Sessions makes no systematic record of its proceedings. The clerk of the Court is simply directed² to keep a register containing a note of all convictions and orders, and of such other proceedings as may be directed by rules made in pursuance of the directing statute. These registers and extracts therefrom are to be *prima facie* evidence only, for the information of Courts of summary conviction in the same county, but they must be supplemented with legal proof of any facts therein appearing. The object of the register is to supply information to justices as to the antecedents of defendants, and to furnish assistance to the Police. There are indeed many orders made in Petty Sessions which do not require even to be drawn up.

We will now see what acts of record a justice of the peace can perform out of Quarter Sessions, and also consider whether they afford the same absolute protection to the acting magistrate as do those of a Court of Record.

In *Bastin v. Carew*,³ Abbott, C.J., declares that it is a general rule of law that when justices of the peace have an authority given to them by an Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required to do in order to originate their jurisdiction, a conviction drawn up in due form and remaining in force is a protection against any action brought against them for the act so done.

Lord De Grey, C.J., emphasises the fact that the acts of justices may be so made of record by Act of Parliament, as in the case of riots, force, and going armed.⁴ An order putting a landlord into possession of deserted premises, under 11 Geo. 2, c. 19, s. 16, is an act of record, and

¹ See *Stephen's Commentaries*, 14th Ed., Vol. 3, p. 294.

² 42 & 43 Vict., c. 49, s. 22.

³ 3 B. & Cres., at 653.

⁴ *Miller v. Seare*, 2 W. Bl. 1146.

protects the constable or other person acting under it.¹ So is a certificate of acquittal under sect. 44 of 24 & 25 Vict., c. 100. There are two kinds of record, therefore, one appertaining to the jurisdiction, and another attaching to a particular act. In the latter case, the record protects any one acting under it, but it is not stated in the judgment in *Ashcroft v. Bourne*² that a justice of the peace cannot be proceeded against, either criminally or civilly, if he has acted corruptly in making it.

In fact, the contrary is specifically declared to be the case in *Bastin v. Carew*,³ where Abbott, C.J., said that the power of making these records cannot be used by the magistrates as an instrument of oppression, as a magistrate acting corruptly (in making a record) is liable to a criminal information. This, indeed, appears to be consistent with theory, for the act of a justice of the peace is not, like the act of a judge of the High Court, the decision of the King who can do no wrong, nor is the record the record of the royal adjudication, but that of a statutory officer, and though an act done in pursuance of it protects the person doing it, yet a statutory record does not cast a reflex protection upon conduct leading up to it. This points to the conclusion that there are two distinct classes of judicial records.

A third question which has agitated the breasts of theorists is as to whether justices have power to commit an offender to prison for contempt of Court. This question, like the others, arises out of the hybrid character of the magisterial office. Were the latter really an emanation of royalty as administrator of justice in this realm, there never could have been any doubt about the matter, for wherever the King administered justice by deputy the power to vindicate contempt and insult must have existed to the full. We do not propose to argue the question here, but prefer rather to rely upon the weight of authority,

¹ *Ashcroft v. Bourne*, 3 B. & Ad. 684. ² *Ibid.* ³ 3 B. & Cres., at p. 655.

which has decided that the Magistrates' Court exists to-day without the power to commit for contempt.¹

If a person commits contempt in the face of the Court he may be removed,² or may be required to find security for his good behaviour, and committed to prison if he fails to find it."³ It cannot be said that the Summary Jurisdiction Acts have altered the position in this respect by making, as they do, Courts of Summary Jurisdiction open and public Courts, although it has been argued that a public Court of justice possesses the right to vindicate any contempt of its prerogative by imprisoning the offender. Indeed, if this change had been made by the Summary Jurisdiction Acts, it must also have revived the controversy as to whether the Court is not of necessity a Court of Record, and would throw the whole question of magisterial liability once more into the melting pot. The practice of arguing that because a Court of justice possesses one incident it also possesses some other, is not a safe one, for, although there are points of similarity in the various Courts, yet so diverse are their origins and status, that no general rule of this sort can be laid down.

Neither the Justices Protection Act 1848, nor the Summary Jurisdiction Act of the same year, attempt to define the status of the petty sessional or occasional Court, which is perhaps rather a pity, as the County Courts Act, passed a year or two previously, had specifically made the County Court a Court of Record.

The Justices Protection Act does not even define the liability of justices, but, without committing itself in any direction, merely says that no action shall (*i. e.*, thenceforward) be brought against them for acts done within their jurisdiction, unless malice alleged and proved.⁴

¹ See *Ex parte Hyndman*, 2 T. L. R. 352; *McDermott v. Judges of British Guiana*, L. R. [1868], 2 C. P. 341.

² *R. v. Webb, Ex parte Hawker*, *Times*, January 24th, 1889.

³ See Odgers: *Libel & Slander*, 4th Ed., pp. 497, 8.

⁴ 11 & 12 Vict., c. 44, s. 1.

Before proceeding to consider in detail the liability of justices of the peace to proceedings, we first observe generally the rule that for a justice of the peace to act under the impulse of an improper motive in the performance of his duties is a misdemeanour, and renders him liable to criminal proceedings. If the offence is one which affects the public at large, the appropriate remedy is a Criminal Information by leave of the Attorney-General, and if a particular person only is aggrieved the proper procedure is an Indictment. Even when there has been no wrongful intention in the mind of justices, they may still be liable to criminal proceedings under some circumstances for performing an act which is illegal, as being contrary to the tenor of their duties as imposed by statute,¹ or if one justice knowingly performs an act which is ordered to be performed by two.

For malice a justice of the peace is also liable to civil proceedings at the suit of the injured party, but if civil proceedings are being taken no Information will be granted: and, if after an indictment has been found, civil proceedings are commenced by the party aggrieved, the Attorney-General will enter a *nolle prosequi*.² An Information, however, may be granted in spite of the fact that a *certiorari* has been issued.³ Going into details as to the criminal liability of justices, we find that "they are like every other subject of this kingdom, answerable to the law for the faithful and upright discharge of their trusts and duties."⁴

The test of liability to proceedings by Information and, in general, by Indictment at the suit of a person aggrieved, is motive and motive alone, though it has to be borne in mind that there is such a thing in law as constructive *mala fides*.

¹ *R. v. Sainsbury*, 4 T. R., at 457, *per* Ashurst, J.

² *R. v. Fielding*, 2 Burr. 720.

³ *R. v. Inhabitants of Seton*, 7 T. R., at 374.

⁴ *Per* Abbot, J., in *R. v. Borron*, 3 B. & Ald., at 433.

Magistrates may be punished criminally for acting harshly or oppressively,¹ dishonestly or corruptly,² through fear or favour,³ for arbitrarily withholding a right, *e.g.*, refusing a licence through partiality or wilful misbehaviour,⁴ for acting from motives of resentment or revenge,⁵ from political bias,⁶ or from other extraneous motive such as attaching unwarrantable conditions.⁷ For deliberately refusing to perform a duty, and also for criminal negligence⁸ or refusal to act⁹ in the discharge of a duty magistrates are criminally liable.

So that to deliberately absent himself from Sessions knowing that the Sessions cannot be held without him is criminal.¹⁰

On the other hand, they are not liable criminally for injuries caused whilst acting *bonâ fide* and from a proper motive, even though a person has been committed to prison without jurisdiction.¹¹

Improperly granting¹² a licence has the same consequences as improperly refusing one, and improperly discharging a person from arrest is an offence equally with improperly making an arrest.¹³

An application for an Information must be made promptly and will not be entertained unless made within a reasonable time.¹⁴

We shall notice later on that special immunity exists for words spoken by a magistrate in his office, and that no liability, either civil or criminal, exists for such.¹⁵

¹ *R. v. Young and Pitts*, 1 Burr. 566. ² *In re Fentiman*, 4 Nev. & M. 126.

³ *Ibid.*, and *R. v. Newton and others*, 1 Stra. 413 (a ministerial act).

⁴ *R. v. Borron*, 3 B. & Ald. 432.

⁵ *e.g.*, political resentment, *R. v. Williams and Davis*, 3 Burr. 1317 (a discretionary Act); and *R. v. Hann and Price*, 3 Burr. 1716; *R. v. Nottingham JJ.*, Sayer's Rep., 216, 217.

⁶ *Ibid.* ⁷ *R. v. Athay*, 2 Burr. 653.

⁸ *R. v. Newton and others*, *supra*.

⁹ *R. v. Jackson and another*, 1 T. R. 653.

¹⁰ *R. v. Holland and Foster*, 1 T. R. 692; *R. v. Bingham, Clerk*, 1 Burn's Justice, 24th Ed., 48. ¹¹ *R. v. Brooke and others*, 2 T. R. 190.

¹² *e.g.*, within two terms, *R. v. Harries*, 13 East, 270; but see *R. v. Marshall*, at 322. ¹³ *R. v. Skinner*, Lofft. 55.

For a mere error of judgment a magistrate is of course not liable to criminal proceedings, however serious the consequences may be;¹ but for a consciously improper and unjust exercise of discretion he is liable either to an Information or an Indictment (*R. v. Young and Pitts*).² In this case Lord Mansfield expresses the opinion that a remedy by action would also lie if the malice was very gross. We venture to express agreement with this opinion, for although the Attorney-General might decline to permit proceedings by Information if civil proceedings are taken, this is because the Information is an extraordinary process of the Crown, and may be refused at discretion. But we know of no established principle of law which deprives an aggrieved person of his remedy to damages because he chooses to proceed to indict the offender as well. To illustrate this we may take the case of a public nuisance. Although a nuisance like an abuse of the judicial office is an offence against the public at large and punishable as such, a private person may bring an action against the offender in respect of any special injury which it may cause to him.³ Not alone does criminal liability rest upon the question of improper motive, actual or constructive, but with one exception, or possibly two, the same applies to civil liability, the exception or exceptions being, as we shall see later, acting *ultra vires*, and possibly misfeasance, in the performance of a ministerial duty.

We now proceed to review a number of decisions showing the extent of the judicial element in acts performed by justices, and tending also to show that the Courts prefer to place upon their acts as favourable a construction as possible so as to exclude any unreasonable liability and to render their office free from oppressive or captious attacks.

In an action, *i.e.* a civil proceeding, against a justice of the peace, in respect of an act performed by him as justice, a

¹ *R. v. Cox*, 2 Burr. 785.

² 1 Burr. 557.

³ Y. B., 27 Hen. VIII, 27, pl. 10.

complainant must allege and prove malice and absence of reasonable and probable cause,¹ unless the act complained of was *ultra vires*, when the magistrate is liable to an action for trespass, or on the case, even without improper motive.² The action, under sect. 1, must be for tort only. This section, as the use of the term "action" implies, refers only to civil proceedings for compensation, and by no means affects the law relating either to criminal proceedings against justices or to supervisory proceedings in the King's Bench Division. Before an action can be brought in respect of any conviction or order, or any proceeding taken in pursuance thereof upon the ground of excess of jurisdiction, the complainant must show that the conviction or order has been quashed.³ When, however, the act complained of is neither a conviction nor an order, and is not an act performed in pursuance of one of these, there is nothing to quash, and the condition precedent therefore does not apply; for an instance, the issue of a warrant of arrest to secure the appearance of the defendant.⁴

A justice is under no liability for an act *ultra vires*, unless at the time when the case was heard the facts showing his want of jurisdiction were laid before him⁵ or else facts from which he ought reasonably to have inferred it.⁶ "Facts" in this connection means *admitted* facts, from which the justice by applying them knew, or should have known, that his jurisdiction was ousted,⁷ and does not mean contested statements, for where there is a conflict of testimony the alleged facts put forward by the parties in support of their various contentions become matter for adjudication, and a justice having, upon hearing the conflicting testimony, decided that he had jurisdiction, cannot afterwards be proceeded against under sect. 2. When a

¹ 11 & 12 Vict., c. 44.

² *Morgan v. Hughes*, 2 T. R. 225.

³ *Ibid.*, s. 2.

⁴ *R. v. Ely JJ.*, 4 W. R. 13.

⁵ *Pike v. Carter*, 10 Moo. 376.

⁶ *Calder v. Halket*, 3 Moo. P. C. 28.

⁷ *Per Pallas, J.*, in *Johnson v. Meldon*, 30 L. R. Ir., at 34.

question of jurisdiction arises, owing to a claim of title having been set up, a justice is perfectly justified, if he thinks that there is no evidence before him of any real dispute as to the ownership of property, in ruling out the objection to his jurisdiction upon that ground.¹ In all cases the burden of proving that uncontested facts were brought before the justice, revealing his lack of jurisdiction, lies upon the complainant.² We may put a magistrate's position as to the dependence of his jurisdiction upon facts in this way—he is protected if he believed in the existence of a state of facts which, had it existed, would have justified him in acting. But this does not entitle him to *assume* the existence of facts, for he must be prepared to show that *some* facts were laid before him upon which he could have formed the opinion which shaped itself in his mind³; but he is not bound to show that the evidence adduced in support of them was convincing to the ordinary mind, for in adjudicating upon facts he sits as judge as well as jury.⁴ In such a case a complainant's only possible remedy is to proceed under sect. 1⁵ alleging malice.

The issuing of process, although a magistrate ought to issue it in a proper case, is a judicial and not a ministerial duty. A magistrate has a judicial discretion to exercise in such a case, and the preliminary inquiry upon which his decision is founded, *i. e.*, as to whether a charge is to go further or not, is quite as much a judicial act as the hearing itself.⁶ For an improper refusal in such a case, the suitable remedy would be either (1) an application for a mandamus to compel the issue; (2) application for a rule under the Justices Protection Act; ⁷ (3) an action under sect. 1 alleging malice; or (4) criminal proceedings by information or indictment,

¹ *Johnson v. Meldon*, *supra*.

² *Calder v. Halket*, 3 Moo. P. C. 28.

³ *Rochfort v. Rynd*, 8 L. R. Ir., 204.

⁴ *Cave v. Mountain*, 1 Man. & G. 257.

⁵ 11 & 12 Vict., c. 44.

⁶ See *per* Cockburn, L.J., in *R. v. Stipendiary of Leeds*, 43 J. P. 490.

⁷ 11 & 12 Vict., c. 44, s. 5.

and we might here add, although it is perhaps not strictly relevant to the present subject, (5) that a judge has ere this been removed from office for using his position to obstruct the course of justice;¹ the granting or refusal of bail is likewise a judicial duty,² and the redress of an aggrieved person is similar to that lastly indicated. The reason for this is obvious, for even though the prisoner may be entitled to bail, the ability of the sureties offered, or the amount of bail adequate to the occasion, are matters upon which the justice has to form a judicial opinion.³ Where two or more parties are directed to do or concur in an act a presumption arises that the act is a judicial one, and not merely a ministerial one, for a purely ministerial act cannot be better performed by two people than by one.⁴ When the person against whom proceedings are taken (*scil.*, before a judicial officer) has a right to be heard before the particular step is taken, the act is a judicial rather than a discretionary one.⁵

Huddleston, B.,⁶ has held, perhaps with a view of giving increased protection to justices, that a building of a police station under 3 & 4 Vict., c. 88, s. 12, was a judicial act, though perhaps it was unnecessary to treat it otherwise than as a discretionary administrative act. The allowance of an apprenticeship indenture for a parish apprentice has likewise been held to be a judicial act.⁷

An application made *ex parte* under the Lunacy Act 1890, sect. 4, to a justice for an order for the reception of a lunatic,

¹ *Montague v. Lieut. Governor of Van Diemen's Land* [1849], 6 Moo. P. C. 489.

² *Linford v. Fitzroy*, 13 Q. B. 240.

³ See *R. v. Badger and another*, Burn's *Justice* [1869], Vol. I, p. 328, as to the effect of refusing bail upon an improper motive.

⁴ See *per* Buller, J., in 3 T. R., at p. 382. A judicial act must be performed by the prescribed number of justices together, but a ministerial act need not. (*Per* Lord Kenyon, C.J., *ibid.*, at 381.)

⁵ See *per* A. L. Smith, L.J., in *R. v. London County Council, ex parte Askerdysh*, L. R. [1892], 1 Q. B., at 195.

⁶ *Hardy v. North Riding JJ.*, 50, J. P. 663.

⁷ *R. v. Hamstall Ridware*, 3 T. R. 380.

is a judicial and not an administrative proceeding, and even though made privately and not in open Court, the officer is protected.¹

No justice acting in the performance of a judicial duty, as has been already observed, is liable for a mere error of judgment. The very nature of the judicial office precludes that and therefore, if a justice, acting *bonâ fide*, issues process against a person upon evidence which is not reasonably strong enough to carry conviction to the ordinary mind, he is, nevertheless, not liable to an action.² *A fortiori*, an arrest upon a false accusation does not render the justice who issues the warrant liable, as he is not responsible for the truth of matters brought before him.³ Malice may be implied from the conduct of the officer.⁴ A magistrate who exceeds his jurisdiction under a mistaken impression of law is liable,⁵ generally speaking, for *ignorantia legis neminem excusat*.

Where upon convicting a prisoner a magistrate makes an order containing two distinct punishments or penalties, one *intra vires*, and the other *ultra vires*, and the conviction has, in consequence of the latter, been quashed, the defendant, if he brings his action under sect. 2,⁶ that is, simply alleging the want of jurisdiction, must be prepared to shew that the injury of which he complains arose out of the putting into operation of the *ultra vires* portion of the order, otherwise the action will fail.⁷

When an action is had for excess of jurisdiction, in respect of a particular step taken by a magistrate in the course of proceedings, the question which naturally presents itself to the mind is this: Admitting that the parti-

¹ *Hodson v. Pare*, L. R. [1899], 1 Q. B. 455.

² *Drew v. Coulton*, per Wilson, J., 1 East, at 563 note.

³ *Windham v. Clere*, Cro. (Eliz.) 130.

⁴ *Drew v. Coulton*, *supra*, per Wilson, J., at 565.

⁵ *Pease v. Chaytor*, 1 B. & S. 658.

⁶ 11 & 12 Vict., c. 44.

⁷ *Barton v. Brickwell*, 13 Q. B. 393.

cular step is wrong, did the magistrate possess original jurisdiction over the subject-matter of the action? If so, such a mistake in procedure will not lay the magistrate open to an action.

Where an ecclesiastical judge ordered a person who had intermeddled with the estate of a deceased intestate to take out letters of administration, but omitted to give the option to renounce, and the order not being complied with, the judge excommunicated the defendant, it was held that the error was one of procedure only. The excommunication was set aside, but the judge was not liable to an action for what he had done.¹ If, however, the judge had possessed no power to make the order calling upon the defendant to take up the administration, the order of excommunication would have been *ultra vires*, for then the whole matter would have been *coram non judice*.² In another case, where an order had been made upon a defendant for payment of a church rate, and a warrant of distress was issued in consequence of non-compliance with the order, Jervis, C.J., held, that the omission to recite the order in the warrant to levy was a defect of form only.³ Where, however, a warrant of distress had included an item for costs, for which the statute gave no power to levy, the introduction of that item was held to be a matter of substance, and as such, made the warrant of distress an act *ultra vires*.⁴ A magistrate is also liable if he issues a warrant in pursuance of a conviction which shows no offence on the face of it.⁵ It is not sufficient to constitute jurisdiction, that a magistrate should possess general jurisdiction in respect of certain offences, but the

¹ *Beaurain v. Scott*, 3 Camp. 388.

² *Ackerley v. Parkinson*, 16 R. R. 317; and see the *Marshalsea Case*, 10 Rep., at 76a.

³ *Ratt v. Parkinson*, 20 L. J., M. C. 208.

⁴ *Clark v. Woods and others*, 2 Ex. 395.

⁵ *Newman v. Earl of Hardwicke and another*, 8 A. & E. 124.

written depositions and warrant (or otherwise a duly-made charge) must disclose a specific offence, and not a civil injury merely, before he is entitled to exercise his punitive powers, nor will it be a good defence for him to say that oral evidence of the offence was, in fact, given before him, although not appearing in the written depositions or warrant.¹ To commit a defendant for an offence under one statute where the conviction shows an offence under some other statute, also renders the magistrate liable to an action as for an act *ultra vires*.²

When a magistrate has once exercised his jurisdiction in connection with a matter, as for instance, if several separate acts are charged and a penalty can only be inflicted in respect of one, and this has been done, he is *functus officii*, and if he adjudicates again by imposing a penalty for the second offence, his action in doing so is *ultra vires*.³

When a magistrate exceeds his jurisdiction, the defendant must take his objection during the hearing, and at the proper time, or not at all, for if the jurisdiction is not properly challenged the right to challenge is lost.⁴

In a case, however, in which a magistrate was successfully sued for trespass, for ordering a prisoner, who was brought before him in custody for drunkenness, after hearing the facts of a charge, to be taken back into remand until the following day, and then brought before him again, there was no reasonable opportunity for challenging the magistrate's jurisdiction, who should either have declined to entertain the matter at all, or else have dealt with it then and there.⁵

The Courts have held that even when a justice has acted in colourable exercise of his office, as where he purports, as justice, to persuade one person to prosecute another, he

¹ *Lawrenson v. Hill*, 10 Ir. C. L. R., at 184.

² *Rogers v. Jones*, 5 D. & R. 268.

³ *Cripps v. Durden*, Cowp. 640.

⁴ *Pike v. Carter*, 10 Moo. 376.

⁵ *Edwards v. Ferris*, 7 C. & P. 542.

is entitled to claim the benefit of the Justices Protection Act, the Public Authorities Protection Act, or any other provisions or rules existing for the benefit of justices, provided he had authority as justice to do the act complained of.¹ The principle of law upon this point is thus stated by Lord Denman, C.J.² "Where the magistrate, with some colour of reason, believes that he is acting in pursuance of his lawful authority, he is entitled to protection although he may proceed illegally or exceed his jurisdiction," and his lordship stated that the fact as to whether he acts with colour of reason and with *bonâ fides* is for a jury.

When, however, a justice performs an act for which he has no jurisdiction, and no reasonable ground for supposing that he had jurisdiction, *e.g.*, orders a woman, who is in custody charged with concealment of the birth of a child, to be medically examined by a doctor, he will not be held to have acted as justice at all, and will not be entitled to notice of proceedings under the Public Authorities Protection Act 1893, but may be sued as a private offender.³ In such a case, Lopes, J., declares, that the fact that he is clothed with the general authority of his office makes no difference,⁴ neither does the fact that the act was not performed from any improper motive.

In another case, when a statute empowered a magistrate to make an arrest at the time of the commission of a particular offence, and some hours later, and after search, the justice arrests the wrong man, under the mistaken impression that he had committed the offence in question, a similar decision was come to.⁵ But it was held in another case, in harmony with the law previously stated as to the duty of magistrates to adjudicate upon evidence, that when

¹ *Kirby v. Simpson*, 10 Ex., 358.

² *Hazeldine v. Grove* [1842], 3 Q. B., at 1007.

³ *Agnew v. Jobson*, 47 L. J., M. C. 67.

⁴ *Ibid.*, at 69.

⁵ *Downing v. Capel*, L. R., 2 C. P. 461.

jurisdiction existed to retain goods upon suspicion of a felony, that a justice who exercised the power was entitled to the prescribed notice of action, although the facts did not reasonably warrant the suspicion.¹

A case we now take introduces a justice in a dual capacity. This officer had been present at a disturbance during an election, and he not only omitted to keep order as he should have done *qua* justice of the peace, but actually took part in the disturbance as a private individual. He was proceeded against criminally, and both charges were sought to be established against him. Lord Denman, C.J., however, held, that in respect of the former complaint he was charged as justice, and was therefore entitled to receive due notice of the proceedings.² In the next case we behold the man and not the magistrate at all. A justice of the peace meeting a solicitor in the street who had conducted a case against him before the local Bench, proceeded to assault him. It was held that the assault was committed by the offender in his private capacity only, and that the appropriate remedy was a summons for assault.³

An aggrieved party may apply to put a justice out of commission, after criminal proceedings in the King's Bench Division.⁴

We shall now refer to the question of the immunity of judges in respect of words spoken by them in the course of proceedings held before them. Judges, both of superior and of inferior Courts, enjoy absolute immunity for words spoken by them in the course of their office. In *R. v. Skinner*⁵ Lord Mansfield plainly lays down the law as follows:—

“I am willing, as neither Sergeant Davy nor Mr. Buller find any precedent in the history of England for an indictment of this kind, to give them time till next term to find any. What Mr. Lucas said is very just; neither party, witness,

¹ *Wedge v. Berkeley*, 6 A. & E. 663.

² *R. v. Hemming*, 5 B. & Ad. 666.

³ *R. v. Arrowsmith*, 2 Dowl., N. S., 704.

⁴ *Ex parte Rook*, 2 Atk. 2.

⁵ Lofft, 55.

counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt and examine on Information. If anything of *mala fides* is found on such inquiry, it will be punished suitably."

It therefore appears that a supervisory Court alone can resent improper speech made by a judicial officer.

It has been held that the word judge in this connection includes a justice of the peace when sitting in a court of justice and performing judicial duties, even though the duties be performed in private.¹ This rule of judicial protection is founded upon public policy, and exists in order to secure perfect freedom and independence for judicial officers in the performance of their judicial duties.² Brett, M.R., says that complete judicial immunity for words spoken in the course of judicial proceedings is not limited to Courts of Justice, but extends to any tribunal holding an authorised inquiry which possesses similar attributes.³ Fry, L.J., in the same case⁴ declares that the rule applies whenever a person or persons are sitting as a Court in the eye of the law, and not merely to Courts of Justice. A Court *in law* is one which possesses judicial functions, and it is distinguishable from tribunals possessing quasi-judicial functions⁵ such as Assessment Committees, Boards of Guardians, the Inns of Court, the General Medical Council, and the ordinary private arbitrator between parties. Courts may be distinguished in the following manner:—

(1) Courts of Record—Courts not of Record.

(2) Courts of Justice—Courts not of justice, such as a Coroner's Court, the jurisdiction of which is investigative only.

¹ *Law v. Llewellyn*, L. R. [1906], 1 K. B. 487; *Munster v. Lamb*, 11 Q. B. D. 588; *Hodson v. Pare*, L. R. [1899], 1 Q. B. 455.

² *Kennedy v. Hilliard*, 10 Ir. C. L. R., N. S., 195, per Pigott, C.B.

³ *Royal Aquarium Society v. Parkinson*, L. R. [1892], 1 Q. B. 431.

⁴ *Ibid.* This case shows that the granting of licences is a consultative or administrative work only, and that tribunals performing it do not enjoy judicial immunity for words spoken.

⁵ *Royal Aquarium Society v. Parkinson*, *supra*.

- (3) Courts of legal jurisdiction—Courts not of legal jurisdiction, such as a Court Martial¹ or Petty Sessional and Occasional Courts.²
- (4) Courts of law—Courts *in* law, such as a Court of Inquiry.³

In the case of *Law v. Llewellyn*,⁴ the words complained of were spoken immediately after and in reference to a criminal charge, to the withdrawal of which the magistrates had just assented, and not in the course of the actual trial, but the words were held to be absolutely privileged.

When magistrates are acting in the performance of administrative duties privately in a room, they do not enjoy complete immunity for words spoken.⁵

The next question for consideration is the civil liability of justices, since the Justices Protection Act 1848, in respect of purely ministerial as distinguished from judicial acts. No distinction exists in regard to their liability to criminal proceedings,⁶ but formerly, as we have noticed, they were liable for tort without malice in respect of their ministerial acts. With great deference to the opinion of a learned judge, which will be referred to here, we are of opinion that the ministerial acts of justices now stand on the same footing as judicial acts. It has to be borne in mind that all their multitudinous and varied duties have been laid upon justices, and have been performed by them, under the name and title of justice of the peace, the name which was given to them by 34 Edw. III, c. 1, and that the title justice of the peace has been applied to them as frequently in connection with their ministerial as their judicial duties.

¹ *Per* Kelly, C.B., in *Scott v. Stanfield*, 3 Ex., at 223.

² Paley's *Summary Convictions*, 8th ed., 183-4.

³ *Dawkins v. Lord Rokeby*, L. R., 7 H. L. 744.

⁴ L. R. [1906], 1 K. B. 487.

⁵ See *Royal Aquarium Society v. Parkinson*, L. R. [1892], 1 Q. B., at 453.

⁶ *R. v. Newton and another*, 1 Stra. 413.

It appears only natural, therefore, that when sect. 1 of the Act¹ says that "every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty *as such justice*," the inference should be that ministerial acts are included. The title of a justice is as wide as the functions of the office when used in this connection. Had the words been "as a judicial officer" or "as judge," the meaning would have been restricted, for we have already noticed the limited legal significance of these titles. This view receives some support upon a consideration of the statutory provisions 2 & 3 Vict., c. 82, s. 1, and 11 & 12 Vict. c. 42, s. 7. The former authorises justices to act "as justice or justices in all things whatsoever," in detached parts of other counties situate within the county in which their jurisdiction lies. Doubts having arisen as to whether ministerial acts were included, the latter provision was passed, declaring and enacting that they were. And then, too, we find a similar expression used in sect. 66 of the Local Government Act 1888,² authorising county councils to pay out of the county funds the costs which a justice may be put to in defending any legal proceedings taken against him *in respect of any act performed by him in execution of his duty as such justice*. This latter provision was passed, presumably, with a full appreciation of the two statutes previously mentioned, and one cannot avoid the conclusion that the ministerial acts of justices of the peace are performed as justice.

It is true that in *Linford v. Fitzroy*³ Lord Denman, C.J., drew the old distinction between the two classes of acts, but the point was not actually in issue before his lordship, and since that *dictum* was given, which followed closely upon the Justices Protection Act itself, we have had light thrown upon the question by statute.

¹ 11 & 12 Vict., c. 44.

² 51 & 52 Vict., c. 41, s. 66.

³ 13 Q. B. 240.

Where a conviction or order of a justice is confirmed upon appeal, no action shall be brought against any justice of the peace issuing a warrant of distress, or a warrant of commitment thereunder, or for any act done under either of them, on account of any defect in the conviction or order under which they were issued.¹ If a defective conviction or order is made by a justice or justices, and a warrant of distress or of commitment issued in pursuance of it by another justice, the latter shall not, in the absence of collusion, be liable to proceedings, but the action (if any) shall be against the justice or justices who made the conviction or order.²

Neither shall a justice who shall issue a warrant of distress against a person named and rated in a poor rate which has been duly made, allowed, and published, be liable to an action by reason of the fact that there was some irregularity in the rate, or that the defendant was not liable to be rated thereunder³; but where a defendant possessed no land at all in the parish, it was held that he might maintain an action of trespass against the justice who granted a distress warrant against him⁴ upon the ground stated by Lord Tenterden, C.J., that no rate had been levied in respect of which the defendant could be assessed.

The law as to discretionary acts of justices is contained in sect. 4 of the Justices Protection Act 1848, which says that "in all cases where a discretionary power shall be given to a justice of the peace by any Act or Acts of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the exercise of such power." This section presumably presupposes a *bonâ fide* exercise of discretion upon the facts laid before the justice.

"Discretion," says Lord Coke in *Rooke's Case*,⁵ "is a science or understanding to discover between falsity and

¹ 11 & 12 Vict., c. 44, s. 6.

² Sect. 3.

³ Sect. 4.

⁴ *Weaver v. Price*, 3 B. & Ad., at p. 411; *R. v. Great Yarmouth JJ.*, 4 New Sess. Cas. 313.

⁵ 3 Rep. 203.

truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will or private affections." If the discretion is not exercised, or not exercised *bonâ fide*, or is not exercised upon the facts of the case,¹ or is exercised from corrupt and improper motives, a motion for an Information may be made if the corrupt motive can be made out;² and the abuse of a discretionary power is punishable more severely than the abuse of one that is not discretionary.³ A discretionary act can be either judicial or administrative,⁴ but presumably only the latter are referred to in this section.

Where a discretion has to be exercised which may be performed in private, and the duty is administrative, it appears that the mere announcement in open Court of a decision or the sealing of a document, *e. g.*, of a licence, does not convert administrative into judicial business.⁵

The differences between judicial, administrative (*i. e.*, purely discretionary), and ministerial acts may be put generally as follows. The individual element in the last-mentioned is practically *nil*, and liability may arise for injury which results from an act based upon an erroneous notion of the facts, or an erroneous interpretation of their significance. In the first and second the facts themselves may be "found" by the officer when there is a contest as to them, and the interpretation also: but in the case of a judicial act the judge is not liable for anything short of malfeasance, but in the performance of purely administrative business the

¹ *R. v. Walsall JJ.*, 3 C. L. R. 100.

² *Rex v. JJ. of Somersetshire*, 1 D. & R. 443; *R. v. Williams and Davis*, 3 Burr. 1317.

³ *R. v. Nottingham JJ.*, Sayer's Rep. 216-17.

⁴ *Hodson v. Pare*, *supra*, at p. 448.

⁵ See the Judgment of Fry, L.J., in *Royal Aquarium v. Parkinson*, L. R. [1892], 1 Q. B., at p. 448.

liability begins with non-feasance and misfeasance, even without *mala fides*.

Justices are under a liability for costs in certain supervisory proceedings against them. A writ of mandamus in general issues either to compel the performance of a ministerial act, the obligation to perform which is clear, or a judicial or discretionary act when the justice's conduct in the case is tantamount to a refusal to hear, or to adjudicate,¹ or to decide the case upon the merits, or when they have allowed extraneous considerations to affect their judgment.² The costs of these proceedings are in the discretion of the Court, and the applicant will generally have to pay the justices' costs if the latter are successful in showing cause,³ but if they are unsuccessful the costs may not be ordered against them, unless they have acted improperly; but when the rule is made absolute, the costs are made to abide the event of subsequent proceedings; and if the writ be obeyed, the successful party is left to apply for his costs.⁴ The costs are in the discretion of the Court in the somewhat similar proceedings under sect. 5 of the Justices Protection Act 1848, for an order to compel justices to perform *any act* relating to their duty. The costs of a Prohibition may be ordered to be paid by the unsuccessful party. A rule for a *certiorari*, when discharged, is generally discharged with costs, and the Court has now power, upon the rule being made absolute, to order the justices to pay costs.⁵

Justices may be ordered to pay the costs of a rule to state a Special Case if they omit, when refusing to state it, to grant a certificate of their reasons.⁶ The licensing juris-

¹ *R. v. Southampton County Court Judge*, 65 L. T. 320.

² *R. v. Coltham*, L. R. [1898], 1 Q. B. 802; *R. v. Cumberland JJ.*, 4 A. & E. 695; *R. v. Adamson*, 45 L. J., M. C. 46.

³ *R. v. Mayor of Bridgenorth*, 10 A. & E. 66.

⁴ See generally thereon, Short & Mellor's *Crown Office Practice*, p. 42.

⁵ *R. v. Woodhouse*, L. R. [1906], 2 K. B. 101.

⁶ *R. v. Bell* [1899], 15 T. L. R. 487.

diction of justices is not a judicial function,¹ and the costs of appeals, therefore, were provided for by the Alehouse Act 1828,² and not by the general law relating to costs of proceedings before magistrates; but Quarter Sessions had no power to order justices to pay the costs of an appeal against the renewal by them of a licence when the appeal was allowed.³ On the other hand, if the appellant failed or abandoned his appeal, *the licensing justices* must have allowed the justices who had been served with notice of appeal sufficient costs to indemnify them in respect of any costs they may have been put to in consequence of the service of the notice;⁴ and when an appeal is allowed Quarter Sessions may make an order under sect. 29 of the Alehouse Act 1828, on the county or borough treasurer, as the case may be, to indemnify such justices.⁵ The Licensing Act 1902⁶ now provides that the appellate Court shall order justices to be indemnified in respect of the costs incurred by them in reference to licensing appeals. Generally, the penalty of costs in all such cases is in the discretion of the superior Court before whom the proceedings are taken, and as a rule costs are not awarded against justices in the absence of misconduct or circumstances of aggravation.

In addition to these safeguards, costs incurred by justices, either in Quarter Sessions or out of Sessions, or of any justice in defending any legal proceedings taken against him in respect of an act done in the execution of his duty as such justice, may be paid out of the county or borough funds,⁷ unless the Court before whom the matter came made another order as to their payment.

W. W. LUCAS.

¹ *Boulter v. Kent JJ.*, L. R. [1897], A. C. 556.

² 9 Geo. IV, c. 61.

³ *R. v. Staffordshire JJ.*, L. R. [1898], 2 Q. B. 231.

⁴ *R. v. Worcestershire JJ.*, L. R. [1900], 2 Q. B. 576.

⁵ See *R. v. Winder*, L. R. [1900], 2 Q. B. 666; and *R. v. West Riding JJ.*, L. R. [1904], 1 K. B. 545, as to the construction of this section.

⁶ 2 Edw. VII, c. 28, s. 20.

⁷ See the Local Government Act 1888, s. 66, and the Municipal Corporations Act 1882.

IV.—LETTING AND SUBSEQUENT SALE: ESTATE AGENTS' COMMISSIONS.

IS the law on this ostensibly simple, but as it would seem tricky, branch of agency settled? In the course of the last twenty years there have been various cases before the Appellate Courts from which one supposed certain definite principles might be deduced, but a recent decision of the Court of Appeal in *Debenham and others v. Warter* (reported in the *Times* newspaper of the 12th of July last) tends to throw doubt on the subject. It may be of interest to inquire into the *ratio decidendi* of some of the authorities.

In *Millar v. Radford* ([1903], 19 T. L. R. 575), upon the facts that the plaintiffs having been employed to find a purchaser, or failing a purchaser a tenant, introduced a man who would not purchase but took a seven years' lease, fifteen months after which he bought the freehold, the Judge of first instance, in an action brought to recover commission on the sale, refused to leave any question to the jury, but entered judgment for the defendant. He did so on the ground that there was no evidence of an agreement by the defendant to pay the amount of commission claimed, and the action on an express agreement failing, he refused to amend by allowing an implied agreement to be set up. But the Court of Appeal in affirming him, and while slyly remarking that the claim of agents to commission in circumstances like these was a claim which was often made, and was likely to continue to be made, pointed out that it was not sufficient to show that the introduction of the purchaser by the plaintiffs was a *causa sine qua non*, but that it was necessary to show that the introduction was an efficient cause in bringing about the sale. "And what," it may be asked, "is efficient cause"? The somewhat perplexing question must be dealt with critically later on. It was common ground that the plaintiffs when they

introduced the subsequent purchaser urged him to buy, and had exerted themselves with that object, but it was in issue whether want of means alone prevented his then buying, or whether he never entertained the idea until the defendant reopened negotiations with him months afterwards. It is true that judgment had been entered on the narrow ground that an oral agreement between the parties as to *quantum* of commission had not been proved, but the then Master of the Rolls (Lord Collins) declared, and this is the point to be emphasised, that upon the above-mentioned facts there was nothing to be left to the jury, and that if any question had been submitted to them it could only have been answered in one way.

Millar v. Radford followed a case of *Gillow v. Lord Aberdare* ([1892], 8 T. L. R. 676; 9 T. L. R. 12), in which it was held by the Court of Appeal that the defendant, having instructed the plaintiffs to let his house furnished, or to let it for a term of years unfurnished, or to sell the ground lease, and they having let it, their mandate was exhausted, and upon the defendant selling the ground lease to the tenant a few months later no right to commission arose, and that there was no question to be left to the jury.

Millar v. Radford was itself followed in *Brandon v. Hanna* ([1907], 2 I. R. 212), a case not of letting where the tenant became purchaser, but of introduction where the person introduced after breaking off negotiations subsequently bought. The defendant having in June, 1904, employed the plaintiffs to find a purchaser of her business, upon the terms of paying them commission if a sale was effected, she was in October introduced by them to two persons who twelve months later did in fact become the purchasers. In February, 1905, however, after negotiations had gone on for some time, the defendant decided not to retire from business, and the plaintiffs were paid certain out-of-pocket expenses and did nothing further. In June, 1905, the

defendant again changed her mind, and through some other agents was again brought into communication with the purchasers, when a contract of sale was concluded. The plaintiffs claimed commission, and a jury having found that the sale really and substantially proceeded from the plaintiffs' acts, judgment was entered for them, the Judge stating that he would, if necessary, have amended the pleadings by adding a claim for breach of contract in countermanding the plaintiffs' authority, such as was put forward in *Green v. Bartlett* (14 C. B., N. S., 681). Upon appeal to the King's Bench Division, judgment was entered for the defendant, mainly upon the ground that the acceptance by the plaintiffs of the small sum for out-of-pocket expenses was inconsistent with the continuance of the original contract of employment. To meet the objection that the inconsistency was a matter of degree and was for the jury, the Court⁴ went on to hold the verdict to be against the weight of evidence. The Court of Appeal, bearing in mind that the Judge at the trial had offered to amend the pleadings, and assuming that the case involved the right of the plaintiffs to commission on any ground they could sustain, affirmed the King's Bench Division, and for the same reasons. "There was the strongest evidence," said Fitzgibbon, L.J., "of the end of any contractual relation in respect of a sale of the premises, and of a termination of the defendant's liability for commission. If the action were maintainable now, it must equally have been held maintainable if those with whom the plaintiffs had broken off negotiations, when the defendant determined not to sell, had become purchasers at any future time upon her changing her mind from any cause." And Holmes, L.J., adds (p. 233): "The mere introduction of the person who ultimately becomes the purchaser is not enough, unless it appears that the introduction has led to the purchase." That is the whole point. What

is the meaning of "introduction leading to purchase"? Lord Collins, in *Radford v. Millar*, says it must be the *causa causans*, and what he says is consistent with that being an inference of law from agreed facts. Holmes, L.J., carefully guarding himself from saying that the small payment in June, 1905, would *per se* have deprived the plaintiffs of commission on sale, proceeds: "It is impossible, consistently with our ordinary conception of cause and effect, to hold that there is any evidence that the sale resulted from the plaintiffs' acts." •No doubt. He may mean no more than that if the jury had been reasonable men, they would have drawn a different inference of fact.

It is true that in *Toulmin v. Millar*, ([1887], 3 T. L. R. 836), the only one of this line of case which has gone to the House of Lords, Lord Watson said: "If A. was generally employed to sell, and thereafter gave an introduction which resulted in a sale, he must be held to have earned his commission, although he did not make the contract of sale or adjust its terms." And again: "When a proprietor with the view of selling his estate goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given." These passages were greatly relied on in *Debenham v. Warter*. But Lord Watson had begun by saying: "It is impossible to affirm in general terms that A. is entitled to a commission, if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction became the cause of the sale. In order to found a legal claim for commission there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate trans-

action of sale." And he emphasises throughout the very strict construction which should be placed on an agent's authority. If he is employed to let only, he will not be entitled to commission upon a sale during the currency of a lease. And if the proprietor says to the agent, "I will sell for X pounds, if you cannot get that then let," the agent's authority would come to an end when he had let. It is perhaps difficult to deduce a uniform principle from every sentence of this judgment, and the learned Lord concluded by saying that the question whether the sale had been brought about by the agent was well fitted for the consideration of a jury, and that the jury might reasonably derive from the evidence inferences of fact fatal to the plaintiff's claim. But *Toulmin v. Millar* was a peculiar case, in that a jury had found that an agent who had admittedly introduced a tenant had not brought about a subsequent sale to the same person, and a Divisional Court and the Court of Appeal had held that this (for a jury) very unusual finding was against the weight of evidence and had ordered a new trial. And *Gillow v. Aberdare*, *Millar v. Radford*, and *Brandon v. Hanna* were all subsequent to it, and in all of them was *Toulmin v. Millar* considered. It may also be observed that Lord Watson's remarks in their natural meaning—at least the two passages which as above stated were so strongly relied on in *Debenham v. Warter*—apply mainly to an introduction which is followed by a sale without any interposed letting, and where no interposed letting has been contemplated. The finding of a tenant, as argued below, may well be regarded by the employer as "implementing" (to use an expression of Lord Watson's) the employment of the agent to introduce, and may be accepted by him (the employer) in satisfaction thereof. The contract of employment (without more) would thus come to an end, and if the mind of the tenant is not then to purchase, or not to purchase except within a limited

time, it is hard to see how, if he purchases after that limited time is expired, he purchases while there is an employment of the agent by the vendor.

It was upon the law as laid down in the cases above referred to that *Debenham v. Warter*, came before the Court of Appeal. A property had been put into the hands of the well-known Cheapside firm, for sale as far back as 1890. There it remained (with but brief interval) until April, 1902, when the man who subsequently became the purchaser was introduced by them, with the result that an agreement was entered into whereby he became tenant for twelve months from the following August at a rent of £600, with an option—exerciseable not later than May, 1903—to purchase for £38,500, and a proportionate abatement of rent if he elected to purchase by then. He did not exercise the option, but he continued tenant until Christmas, 1903, when he went out of possession. The plaintiffs were paid commission upon the entire tenancy rent, but the property was removed from their books as far back as June in that year, the defendant (so he said in a letter) thinking that the fact of the option not having been exercised would spoil the market for some time. And the plaintiffs did nothing further in the matter. Some “flirtation” (to use an expression of Kennedy, L.J.) went on, however, between the tenant and the defendant’s local agent. Twice—in November, 1903, and in March, 1904—it seemed as if terms of purchase might be arranged; but negotiations came to nothing, and the tenant as he then was removed his furniture. And in April, 1904, the property was again placed on the plaintiffs’ books, but for letting only. In July the purchaser’s solicitors and the local agent were again in communication, and this time with better result, for in September a contract of purchase was entered into, at the price for which the option had originally been given, it is true, but some six additional acres

were thrown in, and the defendant undertook to secure the diversion of some roads. The Judge at the trial left it to the jury to say whether the plaintiffs were the "meritorious agents" in finding the purchaser, a question they promptly answered in the affirmative, and the Court of Appeal, in upholding his direction and the verdict, thought it a perfectly clear case, free from doubt and difficulty. The late Lord Esher, presiding at the hearing of the appeal in *Gillow v. Aberdare*, had used much the same language, but in drawing a contrary inference from somewhat similar facts.

It is difficult to reconcile the principles laid down by e.g. Lord Collins in *Miller v. Radford* with the treatment of the facts in *Debenham v. Warter* by the present Master of the Rolls. To the latter it seemed an irresistible inference that the sale was produced by the plaintiff's introduction. So it was in one sense. But for the plaintiffs, the defendant and the purchaser might never have known each other. The first introduction was *causa sine qua non*. So was that given by the plaintiffs in *Gillow v. Aberdare*. But for the introduction of the tenant, the purchaser would never have met the vendor. "That," said Lord Collins, "is not sufficient. It is necessary to show that the introduction is an efficient cause." And Cozens-Hardy, M.R., with his predecessor's judgment before him, goes on to say that "in this case it is an irresistible inference that the introduction was the efficient cause of the sale."

We must get to close quarters with "efficient cause," and we may ask two questions about it. Firstly, does it mean that the agent must do or be in a position to do something more than merely introduce? And, secondly, is what is "efficient cause" to be inferred as matter of law from ascertained facts, or is it inference of fact to be left to a jury and the length of their thumb?

In the first place, it is not too much to assume that "efficient" means something, and that an "efficient introduction" will be an introduction which produces consequences, and that a consequence, in legal contemplation, is that which immediately and naturally flows. What did immediately and naturally flow from the introduction in *Millar v. Radford*? The seven years' lease. And in *Debenham v. Warter*? The letting plus option contract. If in order to bring in picturesque, but loose and misleading, metaphors like "flirtation," you take into consideration subsequent and independent negotiations leading to a sale, you obscure the logical sequence of events and give the go-by to the real meaning of "efficient." The right to commission from this point of view may fairly be compared with the right to damages. You are no more entitled to say that commission is payable in respect of what is non-proximately and only remotely the result of the agent's acts, than you are to award damages for the non-proximate consequences of a breach of contract or tort.

Secondly, is "efficient cause" an inference of fact or of law? It is apprehended that the various Masters of the Rolls would not have been unanimous in their understanding of "efficient cause" as applied to the present case. Cozens-Hardy, M.R., speaks of it as a question of fact properly to be left to the jury. Esher, M.R., in *Gillow v. Aberdare*, and Collins, M.R., in *Millar v. Radford*, approved the action of the Judge in withdrawing the question from them upon facts which were, if it may respectfully so be said, as much in favour of the plaintiffs as those in *Debenham v. Warter*. And in *Brandon v. Hanna* where the jury had found, as juries will, that the sale had really and substantially proceeded from the first introduction, Holmes, L.J., concurred in setting the verdict aside as being inconsistent with our ordinary conception of cause and effect. If the inference is one of fact to be left to a jury in the first instance, but to

be over-ruled by the Court where the facts from which the inference is to be drawn are not in dispute, and the inference drawn by the jury does not accord with that approved by the Court, one would prefer to call it inference of law at once, and to say that it should be drawn by the Judge as soon as the facts are ascertained, as is "reasonable and probable cause" in actions for malicious prosecution.¹ Similar difficulties frequently arise in determining what damages may reasonably be supposed to have been in the contemplation of parties in actions for breach of contract. Lord Esher in *Hammond v. Bussey* ([1887], 20 Q. B. D., at p. 88), seems to think these are not pure question of fact for the jury, and in any view the Courts have always exercised a wide discretion in drawing from ascertained facts inferences which would frequently not be those of juries. In *Debenham v. Warter*, however, the Court of Appeal declared they would have drawn the same inferences as did the jury. For the reasons above given, it is submitted that such inferences were illogical and unsustainable. Reconcilable with those drawn in the earlier cases they were not.

It is a pity that Cozens-Hardy, M.R. (if he is correctly reported in the *Times*), in order to distinguish the principle on which this case turned from that involved in *Brandon v. Hama*, went out of his way to state in his judgment that the plaintiffs all along had relations with the defendant with reference to the property, and that there was no justification for the contention that the original contract of employment was put an end to. It was not suggested

¹ There is an able discussion of what is law and what is fact in jury trials in a treatise on *Evidence at the Common Law*, by J. B. Thayer, professor of law at Harvard University (Sweet & Maxwell, 1898). All such matters as remoteness of damage, what writings are libellous, what are necessities for an infant, are, he argues, strictly speaking inferences of fact which it has never been thought expedient to leave to a jury, or which having been left to a jury and their opinion taken once, precedent and consistency in administration require that similar inferences should be drawn from similar facts in all future cases. The Judge again must keep the jury within the bounds of reason. (See particularly pages 202, 208—210, 222, 249.)

in the course of the case, that when the property was removed from the plaintiffs' books in June, 1903, the defendant had any hope of being thus able to deprive them of commission to which they might otherwise have been entitled, nor that his subsequent negotiations with the purchaser were purposely concealed from them. On the contrary, the evidence, which was mainly on the correspondence, pointed the other way. Nor was there a countermanding of authority as in *Green v. Bartlett*. The plaintiffs had acquiesced in the letting plus option contract, had accepted commission in respect thereof, and when the option fell through, had taken the property off their books without demur. It could not be argued, nor did either counsel or the Court attempt to uphold the claim on the ground that the sale was in the currency of a subsequent employment to sell. If, after the tenant had gone out of possession, there was a new employment of the plaintiffs, it was not to find him as a purchaser, nor in fact did they so find him in the course of their second employment, which was to let only. If they did "effectively introduce" the purchaser, it was at a date anterior to the making of the tenancy plus option contract.

It is at this stage that the importance of observing whether there is an existing employment at the time the sale is effected becomes manifest. The presence of two elements is necessary for the earning of commission. "It is open to the defendant in an action like this," said Lord Collins, in *Millar v. Radford*, "to say either that though the plaintiffs effected a sale they were not his agents, or that though they were his agents they did not effect the sale. If the defendant proved either the one or the other, the plaintiffs failed to make out their case." It is conceived that in *Debenham v. Warter* the employment came to an end, automatically if one may so express it, when the letting plus option contract was entered into. "The

plaintiffs were employed to do one of three things," said Lord Esher in *Gillow v. Aberdare*, "and when they had done one of those three things they had no authority to do more." It is true that in *Debenham v. Warter* the plaintiffs had the defendant's property on their books to sell, but when what resulted immediately from their introduction was effected, viz.: the letting, plus option contract, it seems an irresistible inference—of law if needs be—that both parties accepted that in lieu of a contract of sale. The defendant got what satisfied him for the present, viz.: a tenant who might purchase, and the plaintiffs were to get in virtue of it what might be regarded as a substantial recompense for their trouble, commission on letting at least, and commission on sale if the option was exercised. It is immaterial that the plaintiffs may have acquiesced in the making of this contract with a mental reservation (in this case not communicated to the defendant) that if at any time after the expiration of the option, a sale to the person introduced should come about, they would claim commission. So far as the defendant was concerned, the mandate to the plaintiffs (to use Lord Watson's expression) was exhausted as soon as a contract satisfactory to himself was entered into. Its existence was inconsistent with the continuance of an employment to find a purchaser apart from it. The employment had merged in it.

Can it be said that it is a question of intention on the part of the agent and his principal, when the contract of employment is entered into, under what circumstances the commission shall be earned? If so, it may be a question of fact "well-fitted," as Lord Watson said, "for the consideration of a jury." But if the intention has never been formulated in words, upon what evidence can the jury find one way or the other? If there has been no express agreement, can it be said that there is in existence an "admitted state of facts capable of two equally possible views which

reasonable people may take," in which case alone should inference from admitted facts be permitted to a jury?¹ Surely not. For this reason it is submitted that questions were rightly withdrawn from the jury, both in *Gillow v. Aberdare* and in *Millar v. Radford*, albeit in both the plaintiffs had done their best to bring about sales before leases were granted.

Hard cases make bad law. In *Debenham v. Warter* the plaintiffs had had the property on their books for twelve years, had been at considerable pains in sending persons to view, and the man whom they eventually found to occupy did in fact become the purchaser. Had the parties expressly agreed that upon a tenant introduced by the plaintiffs becoming the purchaser within a limited period, say of five or seven years, commission as on sale would become payable, such agreement would not have been unreasonable, and plaintiffs (as in *Millar v. Radford*), when an express contract fails them, like to allege a custom in the profession to that effect. But though frequently printing terms of commission in which it is set forth that on a tenant at any time becoming purchaser commission as on sale (less commission paid on the letting) will become due, estate agents rarely bring these terms so clearly before the notice of their clients as to bind them contractually. Did they do so the client might demur to the "all time" part of the proposed arrangement. But until and unless terms of employment are specifically defined, actions like those with which we have been dealing will be common, and the agent fortified by the recent decision in *Debenham v. Warter*, and hopeful of being able to get to a jury, may find it business not to force his terms too closely upon the attention of his clients. In the meantime vendors will have to adjust their purchase-money, uncertain whether an agent's commission—or if another

¹ *Semble, per Bowen, L.J., in Davey v. London and South Western Railway* (L. R. [1883], 12 Q. B. D., at p. 76).

agent has come on the scene, whether two commissions—may not be payable. The law apparently has yet to be settled, and it may be to the interest of the legal profession that the decisions of the Court of Appeal should remain in their present state.

J. K. F. CLEAVE.

V.—THE CRIMINAL PROCEDURE AND SUMMARY JURISDICTION (SCOTLAND) BILL.

AT the close of last Session, the Lord Advocate of Scotland introduced this Bill, which, if it passes into law, will have a far-reaching effect on summary criminal procedure in that country. His Lordship has indicated that he wishes to elicit public opinion upon the Bill. This laudable desire will be furthered if legal journals will devote a portion of their space to a consideration of the general scope of the measure, and of the principal changes which it is designed to effect. It will not extend beyond Scotland, but many of the readers of this magazine south of the Tweed are interested in the broad question as to what is the best mode of exercising summary jurisdiction, even though the particular application of the principles may not directly touch their own practice.

The chief tribunals which exercise summary criminal jurisdiction in Scotland are three—the Sheriff Court, the Justice of Peace Court, and the Burgh Court. The Police Court may be classed with the Burgh Court, and the Court of the Bailie of the river Clyde is a purely local jurisdiction. These Courts try in a summary way all the minor crimes at Common law, and a great variety of offences constituted by statutes. So far, therefore, as importance is derived from the number of persons affected, summary jurisdiction is far more important than solemn jurisdiction, and although it

falls behind in the degree of punishment which may be inflicted, its limits in that respect are not trivial. A sentence of sixty days' imprisonment or, under certain statutes, twelve months' imprisonment, is a serious matter for the person convicted, and the power to impose it calls not only for scrupulous care on the part of those who exercise such jurisdiction, but also for a clear and precise definition of the regulations under which it is to be administered. At present, the latter requirement is met in a very defective manner.

Summary criminal jurisdiction in Scotland may be said to have received the outline of its present form from Sir William Rae's Act of 1828. To-day it is regulated mainly by the Summary Procedure Act 1864, the Summary Jurisdiction (Scotland) Act 1881, part of the Criminal Procedure (Scotland) Act 1887, and the Summary Prosecutions Appeals (Scotland) Act 1875, as regards the Sheriff and Justice of Peace Courts. The Burgh and Police Courts are chiefly guided by the Burgh Police (Scotland) Act 1892. In addition, however, numerous provisions, scattered through Acts of Parliament, have to be taken into account, and a vast mass of precedents established by decisions of the High Court of Justiciary. It is a matter for deep regret that the High Court, instead of endeavouring to lay down a plain and sensible code of rules, suitable for the conduct of business, which had of necessity to be overtaken in a rapid and summary way, adopted a system of minute verbal criticism and of exact detail, often exceedingly trivial, which has involved many parts of summary procedure in doubt and confusion. The Court was no doubt guided by strict logical and juridical principles, but a small measure of logic and jurisprudence is sufficient, if there is the desire on the part of the inferior judge to do justice with impartiality and clemency. The result has been that proceedings are now encumbered with "barren verbiage," inserted to meet the

requirements of the precedents, but often concealing the meaning, and rendering the charge all but unintelligible to the person who has to answer it.

It follows from what has been said that the first object of the Bill is SIMPLIFICATION. This it attains in two ways—(1) by codifying and collecting within the four corners of one Act, enactments now spread over many statutes; and (2) by reducing the forms of procedure to the utmost simplicity consistent with accuracy. In itself it contains a code of summary criminal procedure*from the first step in stating the charge to the last step in disposing of an appeal.

The proceedings are to begin, as at present, with a Complaint. This document will specify the Court and the prosecutor, and then, addressing the accused person by name, tell him in the plainest language what he is charged with—"You are charged, at the instance of the Complainer, that on 20th September, 1907, in George Street, Edinburgh, you did so-and-so." If the accused person has contravened an Act of Parliament, the Complaint will tell him that he did so-and-so, "contrary to The Prevention of Crimes Act 1871, section 7," or whatever Act has been contravened. A very full Schedule of Forms of Charge gives an example of almost every style likely to occur in ordinary practice.

The complexity of statement to which we have adverted is obviated by the 16th clause. It provides that no further specification in the Complaint shall be required than a specification similar to that given in the forms, and also that such specification shall imply that the statute libelled applied to the circumstances existing at the time and place of the offence; that the accused was a person bound to observe those statutory provisions which he is alleged to have contravened; and, generally, that all the circumstances necessary to a contravention then and there existed. The prosecutor must specify the act which the accused person

has done or omitted to do, and state that his act or omission was contrary to a particular section of a statute or of an Order by a Public Department duly authorised. Having done so, he undertakes the burden of proving all the facts necessary to a conviction under the statute, but he is not compelled to enumerate them in his Complaint. What this means may be estimated from the fact that a relevant charge under the Vaccination (Scotland) Act 1863 demands at present at least 230 words, whereas the form in the Schedule to the Bill contains about 24. There is the added gain that the Complaint in the shorter form is much more intelligible.

The Bill dispenses with needless prolixity in the forms of procedure. The warrants are expressed in the fewest possible words, the record preserves the briefest account of what took place before the Court, and the conviction is a simple note of the finding of the Court as to guilt or innocence, and of the sentence, if any, imposed. In order that the forms may be kept up to date without the necessity of repeated recourse to Parliament, the High Court of Justiciary at Edinburgh is to have power to cancel or amend the existing rules and forms, or to make new ones.

The second great purpose of the Bill is to extend the summary criminal jurisdiction of the Sheriff, the most important of the Scottish inferior judges. At present, the Sheriff, when dealing summarily with a Common law crime—theft, for example—cannot award a longer term of imprisonment than sixty days; but under various Acts of Parliament his powers are much greater. Hence arise such anomalies as this: that if a previously convicted thief is found in a dwelling-house under circumstances which satisfy the Court that he was about to steal, but having stolen nothing, the Sheriff can summarily send him to prison for a year; but if the thief has stolen anything, he cannot in a summary trial exceed sixty days' imprisonment. The one case is a

contravention of the Prevention of Crimes Act 1871, s. 7; the other is theft by house-breaking at Common law. In practice, therefore, it is necessary to proceed in such cases as the latter, by the slower and more cumbrous process of libelling by indictment. Clause 10 of the Bill proposes to partially amend this condition of affairs. Under it the Sheriff will have in all cases power to imprison, if necessary, for three months, and where the prisoner is charged with a crime inferring dishonest appropriation of property, or personal violence, aggravated by at least two previous convictions, to six months. This provision will benefit the prosecutor by reducing expense, and the accused person by expediting his trial.

In the third place, the Bill is designed to amend the procedure as to evidence in certain cases, so as to save expense. A provision as to the admission at an early stage by the accused that the previous convictions libelled apply to him, will save the attendance of unnecessary witnesses, sometimes from a great distance. A man may be tried in Scotland, whose previous convictions took place in the South of England, and under the existing system witnesses from there would have to be produced in readiness to prove them at the trial. Then, hardship frequently arises from the impossibility of calling at the hearing of the case a material witness, who is unable to attend through old age, illness, or absence from the country. There is as yet no method by which such evidence can be adduced; but under the Bill means are provided for taking it at a *separate diet*, either at the residence of the witness, or elsewhere. Much money and time are wasted in leading formal evidence to prove letters, minutes and orders, issued from public departments and boards, which nobody disputes, but which cannot be got into the case in any other way. It is proposed that such documents should be received in evidence without being sworn to by witnesses. Again, in cases where a

pecuniary penalty only is asked in the first instance, facts and documents, as to which there is no disagreement, can be admitted by the parties without formal proof. All these are highly beneficial provisions.

The fourth purpose of the Bill is to provide a new and more equitable scale of imprisonment for non-payment of fines. This will be found in clause 45. We need not go over it here. It is graded from a fine not exceeding 5s., with an alternative imprisonment not exceeding three days, to a fine not exceeding £20, with alternative imprisonment not exceeding three months. The Court is also to have power to dismiss the accused in a charge under statute with an admonition, without imposing some penalty, a proceeding prohibited by decisions of the High Court, for which prohibition there seems to be no real necessity. As the alternative imprisonment specified in the Bill is to be extended to all statutory charges, we shall have the basis for a uniform measure of punishment, both in these cases and in charges at Common law. We shall only desiderate care in exercising the power, on the part of the inferior judge.

The last subject to which we shall advert is one of great moment, the fifth purpose of the Bill, the more prompt and efficacious mode of review, which it provides. Speaking broadly, this mode is Appeal to the High Court of Justiciary at Edinburgh on a Case Stated by the inferior judge, as introduced by the Summary Prosecutions Appeals Act of 1875; but the procedure is greatly improved, and the scope of the measure enlarged. Although other methods of review are not specifically abolished, it is anticipated that the improved mode will gradually supersede these.

Under the 1875 Act, the only appeal permitted is against a determination of an inferior judge as erroneous in point of law. The 58th clause of the Bill provides a much greater choice of grounds of appeal —

(1) The relevancy of the Complaint;

- (2) Irregularities in procedure ;
- (3) Any alleged error of the Court in point of law ;
- (4) The sentence imposed, if of undue severity ; and
- (5) Generally, any matter which may at present be competently reviewed by suspension, appeal to Circuit Court, or otherwise.

Review on the merits will only be competent, where such review is permitted by the statute under which proceedings have been taken, and when a note of the evidence has been preserved.

Longer time is allowed to the appellant for taking the various steps necessary to obtain review, and facilities are given to him for obtaining interim liberation, if he has been sent to prison in virtue of the judgment which is under appeal. The prosecutor also derives advantage from the provision that if, ~~as~~ occasionally occurs, he is satisfied that a mistake has been made, and that the judgment cannot stand, he may consent to its being set aside without the cost and delay of a regular Appeal.

Further powers are given to the High Court to do justice in the Appeal. The Court may affirm, reverse, or amend the judgment under review, substitute fine for imprisonment in the sentence, reduce the term of imprisonment or the amount of the fine, or remit the case back for amendment, or with instructions. The Appeal Court may even, in the case of an appeal against an acquittal, either convict and sentence the accused person, or remit him to the inferior Court for sentence. Surely justice will be attained under such powers ?

There is a beneficial provision in clause 74, designed to check frivolous appeals on merely technical grounds. In future it is proposed that a conviction shall not be quashed in respect of objections to relevancy and the like, unless these have been stated in the inferior Court by the agent of

the accused person. If he had no agent, this bar would not apply. Nor will a conviction be quashed on purely technical grounds, unless the High Court is of opinion that the appellant has been misled or prejudiced, and that a substantial miscarriage of justice has resulted.

In our consideration of the Bill we have mentioned only such salient points as will be appreciated by both English and Scottish lawyers alike. There are numerous matters amended by it, which are either technicalities, the bearing of which can be understood by Scottish practitioners alone, or small details, the importance of which is not obvious, except to one familiar with the daily practice of Scottish Summary Courts.

The Bill is a large and comprehensive measure, which ought to settle the rules of summary criminal procedure in Scotland for many years to come. It embodies the experience of men who have devoted a large part of their lifetime to the study of the subject. No human work is perfect, and the Bill will probably be improved in its passage through Parliament; but, as it stands, it forms a very complete code for the regulation of summary jurisdiction from beginning to end. Its outstanding features are these: it codifies and simplifies procedure, and, while it facilitates the administration of justice, and reduces the expenditure of public money, safeguards the interests of those unfortunate persons who are called to occupy the position of defendants in summary criminal process. It will go far to exterminate, or at least to bridle, a class whose disappearance no one will regret—the men who hang about Criminal Courts as advisers of the lower class of accused persons, and whose leading hope is to snatch an acquittal on a merely technical plea, or to succeed in getting a well-merited conviction quashed on account of a superfluous letter, or an ambiguous conjunction.

HENRY H. BROWN.

VI.—THE PUBLIC TRUSTEE ACT 1906.

THE Public Trustee Act 1906, which comes into operation on 1st January, 1908, is the result of two tendencies which have been very noticeable of late years. The first is the tendency to extend the sphere of officialism. It was formerly a characteristic of English law, and of the administration of English law, to leave the performance of many duties more, or less public in their nature to private individuals. That characteristic has now entirely disappeared, and day by day duties more private than public are being grasped by the impartial but icy hand of the official. The other tendency is to exact a higher standard of honour from those who undertake the performance of duties for others. The history of the law of Trusts is a good illustration of this. The Common law held that when a man chose to trust his property to the faith of another, on that faith he must rely, and if it failed him—well, he only had himself to blame. The law would not help him. The Court of Chancery altered this, but it interfered for the benefit, not of the settlor, but of the trustee. The Chancellor, who was a *priest*, sought to prevent the trustee from sinning against his soul by breaking his word. He had, however, no punitive powers, and did not distinguish between an honest and dishonest breach of duty. It was not till the Larceny Act of 1861 that a fraudulent trustee could be proceeded against criminally, and even then, consents of various kinds were (and indeed still are) required before proceedings could commence. Now, however, while the liabilities of the honest trustee are being every day lightened, prosecutions of fraudulent trustees are becoming more and more usual, and, as the Prevention of Corruption Act 1906, shows, the enforcement of greater honesty in those entrusted with duties to others is being extended to classes outside regular trustees.

The influence of these two tendencies in helping the advent of the public trustee, was first seen in the Judicial Trustees Act of 1893. That Act provided the Court with powers to appoint an official trustee *ad hoc* in cases where in the discretion of the Court it was desirable to do so. The Act failed chiefly through the reluctance of the Court to throw a slur on trustees by appointing an official to examine into their acts until there was given some positive proof of maladministration,¹ by which time, as might be expected, an appointment was too late usually to protect the trust estate.

The Public Trustee Act 1906 goes a long step beyond this. It creates a permanent government department charged with the duty of watching, and, where necessary or convenient, of undertaking the administration, not merely of express trusts, but of the estates of deceased persons. That department is embodied in an official called the Public Trustee, who is created a corporation sole with perpetual succession and an official seal. The public trustee has conferred on him, as we shall see, extensive powers which he can delegate to subordinate officers, who can do on his instructions all acts save such as otherwise could "only be lawfully done by a barrister or duly certified solicitor" (sect. 11 [3]). He has the duties and liabilities of a private trustee, subject to this limitation, that he is not responsible for any such liability which an ordinary trustee might incur, to which he has not in any way contributed, and which he could not by the exercise of reasonable diligence have averted. The Consolidated Fund is answerable for his liabilities (sect. 7 [1]).

One or two observations may be here made. A characteristic of a corporation sole is, that the person for the time being representing it may die, and when he dies the corporation is in abeyance till another person is appointed. It was this consideration which led the Common law to the

¹ *In re Radcliffe*, L. R. [1898], 2 Ch. 352.

conclusion that a corporation sole has no capacity to hold pure personalty.¹ Now, an Act of Parliament can confer such capacity, but the Public Trustee Act does not expressly do so on the public trustee, though possibly it does so by implication. Further, it has made no provision for the carrying on of the work of the office when the officer is dead. No doubt on the appointment of a successor his title relates back to the death of his predecessor, and he can adopt the acts done by his subordinates as his own. But still in strict law no such subordinate will have, as the Act stands, any legal right whatever to act for the public trustee; the personalty vested in the late public trustee will become practically *res nullius* till the appointment of a new one, and no legal title can be made to it till then. That last point is important since, as we shall see, the Public Trustee has power to vest property in himself by a simple declaration. Possibly this oversight may be remedied by rules made under sect. 14 (1) b, *i. e.* for the "transfer to or from the public trustee of any property," though this can only be done by stretching the words of the statute, since, while the office of public trustee is vacant, there is no public trustee to or from whom property can be transferred.

It is not the object of this article to enumerate or criticise in detail the powers conferred by the Act upon the public trustee or the provisions by which these powers are guarded. We wish merely to comment on one or two points in connection with them which are very novel and very important.

The first of these is with regard to the administration of small estates. By sect. 3, where it is proved to the satisfaction of the public trustee that the gross capital value of an estate is less than £1,000, and where it appears to him the persons entitled are persons of small means, he shall (unless he sees good reason to the contrary) take over the

¹ *Bl. Com.*, Vol. I, p. 477.

administration of such estate on the application to him to do so of any person who, in his opinion, would be entitled to apply to the Court for an order for administration, and on his declaring in writing, signed and sealed, his undertaking to administer the property, it is to vest in him as fully as a vesting order would vest it. This provision applies, it is to be remembered, not merely to ordinary trust estates, but also to the estates of deceased persons (sect. 15).

It may be said at once that no more arbitrary or dangerous power than this was ever conferred by law upon any official; and if the public trustee is at all given to magnifying his office—which most public officials are now-a-days not reluctant to do—it will probably result in more evils than those it was intended to avert.

Practically, the section gives the public trustee power to take over (and charge the estate with fees for) the administration of every small estate. It is true that he cannot do so except on the application of a person who, "in his opinion," would be entitled to apply for an order of administration. Unless the experience of all Chancery lawyers is at fault, he will not have long to wait for such an application. That experience is that, but for the healthy fear that the applicant to the Court might find himself saddled with the costs of administration, three out of four small estates would be thrown into Chancery. And when any beneficiary was entitled as of course to an order of administration, even that consideration was not sufficient to restrain this practice, and it was found necessary by the Rules of the Supreme Court to give the Court a discretion to refuse orders. It may be said that the public trustee has the same discretion, and that under sect. 10 there is an appeal against any decision of his to the Court. But it is well to remember three things. In the first place, the public trustee is under a temptation to make his office a success by keeping it full of work. In the second, he has no power to order an

applicant to pay the costs of administration where, after he has taken over the administration, he finds there were no sufficient grounds for his doing so. And lastly, the likelihood of an appeal against his decision is small when the gross value of the estate is less than £1,000, and the persons entitled are of small means, and the success of an appeal is improbable when he is entitled to take over the administration where "he is of opinion" the Court would order administration.

Undoubtedly if the public trustee exercises rigorously his discretion to refuse to interfere in the administration of small estates, the powers here given him will do no harm, and may in many cases prevent the robbery of the poor. If he does not, private disappointment and private malice may lead to the squandering of many small heritages. The administration of estates by public officials is in this country always honest, but seldom efficient, and never cheap. The history of Bankruptcy proceedings is enough to prove that. It is to be hoped that a new era of two-and-sixpence in the pound dividends on legacies is not dawning upon us.

This same sect. 3, which ostensibly deals only with small estates, contains a provision which appears, from its wording, to apply to all estates small and large. By sub-sect. 5, "where proceedings have been instituted in any Court for the administration of an estate, and by reason of the small value of the estate it appears to the Court that the estate can be more economically administered by the public trustee than by the Court, or that *for any other reason* it is expedient that the estate should be administered by the public trustee instead of the Court," an order to that effect may be made, and the rules applicable to small estates will apply.

The effect which the appointment of the public trustee to administer an estate, large or small, will have upon the rights of an executor and the discretion of a trustee, will probably yet give the Court some trouble. An order for administration does not take away an executor's right of retainer.¹

¹ *In re Belham*, L. R. [1901], 2 Ch. 52.

Will a written declaration of the public trustee appointing himself administrator do so? Nor does an order prevent a trustee exercising his discretion subject to the approval of the Court.¹ Will this discretion be transferred to the public trustee when he is appointed in an administrative action to administer the estate?

By sect. 4 the public trustee, or such banking or insurance companies or other bodies corporate as rules under the Act shall prescribe, may be appointed by order of the Court, or by the testator, settlor or other creator of the trust, or by the donee of the power to appoint new trustees, a "custodian" trustee. This seems a valuable provision. The object of the appointment is simply to secure the safety of the trust property, and not to interfere with the ordinary duties and powers of the regular or managing trustees. Whether, however the provisions of sub-sect. 2 (h) do not go a long way to defeat this object is open to question. By it a custodian trustee is relieved from liability where he acts honestly, on representations by the managing trustees of matters of fact on which the title to trust property depends, or on legal advice obtained by them independently of him.

With regard to the appointment of the public trustee as an ordinary trustee nothing need be said, except that it is to be desired (and no doubt will be the case), that the Court will freely exercise its power of forbidding his appointment merely for the purpose of relieving trustees and executors, at the expense of the estate, from the burden of discharging duties they have voluntarily undertaken. The provisions of sect. 6 (1) are, however, very novel. Under it, the rules may provide that the public trustee may take out probate or letters of administration, and is to be considered as entitled to letters of administration as much as any other person or class of persons, but when application is made by the widower, widow, or next-of-kin, his citation is not to be

¹ *Minors v. Battison*, L. R. [1876], 1 A. C. 428.

necessary, and unless for good reason the widower, widow, or next-of-kin is to be preferred. It is to be noted that the last part of this subsection only applies to letters of administration. No provision is made as to the respective rights of executor and public trustee where both apply for probate. Is it left to the Court's discretion which to appoint, or is this a matter to be settled by the rules which allow the public trustee to apply for probate?

A further very useful provision is as to the audit of the accounts of trustees. By sect. 13, on the application of any trustee or beneficiary, such accounts may, every twelve months, be audited by a solicitor or public accountant agreed upon between the applicant and the trustees, or, if they cannot agree, by the public trustee. Where the applicant is himself the trustee, apparently the section does not operate. Was this really intended?

Though the Act is to come into operation on the first day of the coming year, no rules as yet have been issued under it. A great many of the points above criticised may be made clear by such rules. These are to be made by the Lord Chancellor, but no doubt the chief burden of making them will and should fall on the public trustee himself, who is chiefly concerned in making the working of the Act as smooth as possible. In view of this, the criticism of the Lord Chancellor's action in appointing a gentleman to that post months before the Act comes into force, was very pointless. If fault is to be found, it should rather be that such appointment was not made early enough. Settlers, testators, trustees, *cestuis que trust* and their legal advisers, should have time to consider the whole effect of the Act before it is actually in operation.

J. ANDREW STRAHAN.

VII.—THE INTERNATIONAL LAW ASSOCIATION AT PORTLAND.

THE International Law Association has of late been extremely active in the matter of holding Conferences. Its rules provide for annual Conferences, but this, which was no doubt the intention of its founders, has for a considerable time been regarded as a counsel of perfection, and the biennial meeting has been the rule for many years. This arrangement has the advantage of harmonising with the engagements of the International Maritime Committee, in the work of which the Association co-operates by a special Committee, and by an unwritten understanding the two bodies meet normally in alternate years. This arrangement, however, has been departed from in special circumstances. The Maritime Committee, on the initiation of its English members, met in Liverpool in 1905; and in the same year the Association held its first Conference in Norway. In 1906, the Association was invited to meet in Berlin—an opportunity of cementing the good relations between Germany and other countries which could not rightly be neglected—and the Association's visit to Berlin cannot have been without its influence in bringing about the improved state of feeling which now happily prevails in Europe. In the ordinary course of events, the Association would have deferred its next meeting until 1908, for which year a cordial invitation had been received to assemble in Buda-Pesth. Special circumstances, however, asserted their sway. The Association was projected in America. Americans were its energetic founders and its untiring pioneers. It has many American members. But it has only held one Conference in America—eight years ago; and the invitation of the American Bar Association to assemble at Portland, immediately after their own

meeting in 1907, following the precedent set in 1899, was therefore gratefully accepted.

Thus it comes about that four Conferences have been arranged for four successive years. The Portland Conference, held in the last three days of August, was a short meeting, this having been purposely arranged to admit of both the American Bar Association and the International Law Association completing their proceedings within a week. The fact that the Hague Conference was sitting simultaneously, while it deprived the Conference of the presence of some of its active members, also made its friends apprehensive that its discussions would wear a certain air of unreality. Everything was going to be finally settled by the Excellencies at the Hague. What profit was there in discussing the old law which was condemned to the scrap-heap?

In point of fact, these discussions by statesmen, merchants, shipowners and public men, are precisely what must take place before the divergencies of opinion which it has been the principal result of the Hague Conference to bring to light can be put in a fair way to be reconciled. Nothing is more instructive than the recommendation of the Hague Conference that the next such gathering should be preceded by two years' systematic study of the programme. The Institute of International Law does invaluable work in this direction; but the results of its study are highly juridical, and are not diffused beyond a narrow circle of jurists. To obtain commanding results, International law must make an appeal to a wider public. The Portland Conference of the Association was therefore of far more than academic interest. The questions it discussed have not been solved by the combined wisdom of the Powers. Such papers as that contributed by Lord Justice Kennedy on Contraband have the same conspicuous value which they would have had if the Hague Conference had

never met. The inaugural address by Chief Justice Baldwin (Connecticut) laid stress on the great principle, which he described as "the soul of International law," the equality of its justiciables, and called special attention to the continual abstention of the United States and Great Britain from the official conferences, now being held at regular intervals by the other States, for the object of removing conflicts of law in the field of Private International law, which have clearly resulted in a series of treaties.

The first subject dealt with, as is customary at these gatherings, was International Arbitration. Dr. Evans Darby, secretary of the Peace Society, London, who for some years past has contributed valuable reviews of the condition and prospects of the movement, entitled his paper on this occasion, "Intermittent Progress in International Arbitration"; thus emphasizing the momentary state of expectancy rather than of present development which prevails at this juncture. A novel proposal in this connection was advanced by Professor Charles Noble Gregory (Iowa University), who argued from the right of "eminent domain" which a nation possesses, and which entitles it to be considered internationally as the sole and absolute owner of its territory, that the *civitas gentium* must be clothed with a similar right, extending to the *orbis terrarum*, and enabling it to dispossess any State of its minor rights for the common good: the fitness of the occasion to be decided by arbitration. Such a proposal furnishes another instance of the tendency of United States jurists to argue from the "States" of the Union to the independent States known to International law. It was supported by copious illustrations from the history of the former. But even in their case, it seems that a State cannot be forced to part with its rights against its will. After all, rights are not merely a matter of superficial expediency. Cyrus was wrong when he gave the big boy the little boy's large cloak.

In a third paper on the same subject, one on Disarmament by Dr. A. C. Schröder (Zurich), a useful conspectus was given of the history of Arbitration, and of the practical difficulties at present in its way. The author propounded the view that tariff walls are inimical to peace, since States are irresistibly impelled by economic pressure to war, for the purpose of breaking them down. The opposite thesis, namely, that the peace of the world is best secured by retaining the power to bargain, was maintained by Mr. Balfour Browne, K.C., in a paper which sought to show, from the analogy of international practice in time of war, that international agreements for tariff treaties are the logical and most effective modes of regulating international commerce.

The next subject to be discussed was that of Divorce Jurisdiction, which was carried over from the Berlin meeting. Mr. W. G. Smith (Philadelphia) opened with an exposition of the efforts recently made to effect some uniformity in the State laws on the subject in force within the limits of the United States, which show that American opinion has come to recognise that the extreme diversity of the attitude of the different State legislatures is an evil, whether or not the laxity of some of them be in itself an evil or not. A Divorce Congress, which met in 1906 at Philadelphia, and was attended by official representatives of the various States, has formulated a code of rules to be followed in assuming jurisdiction, which are substantially at one with the recommendations of the Uniform State Laws Commission—a voluntary body of lawyers which has included this subject in its wider field of work. Mr. J. Arthur Barratt (London), formerly of the American Supreme Court Bar, following the lines of the paper which he contributed to the Berlin Conference, urged, with the weight attaching to a speaker versed both in American and English practice, that English Courts were certain not to recognise divorce judgments passed where the parties had no real domicile. He

proposed and carried a resolution that a Committee be appointed to confer with the Uniform State Laws Commission, and to collate all known laws on divorce and divorce procedure; and suggested that in order to obtain international recognition American divorces might well be required to be registered, say at Washington; and that the advertising pests known as "Divorce lawyers" should be disbarred. In the discussion which followed these papers, Mr. Hart (Louisiana) drew attention to the importance of giving effect to the decision of the Supreme Court in *Haddock v. Haddock*, in connection with "migratory divorces."

The paper on Contraband of War by Lord Justice Kennedy was conceived on the same lines of broad and impartial exposition as the striking paper on the Immunity of Private Property at Sea, which he read at Berlin last year. The Lord Justice referred to the British Government's suggestions for the abolition of contraband, and, if the "ending" system should not obtain favour, he recommended the strict imitation of the category of absolute contraband, the establishment of pre-emption for occasional contraband (and that only when proved to be destined for warlike use, and subject to a liability in damages for pre-emption on insufficient proof); and he suggested that the area of search might in some way be limited, and the voyages of mail-packets rendered safe from interruption. Mr. Justice Elliot (Minnesota), at the close of a comprehensive review of the whole subject, urged that Governments should supervise the export trade of their subjects so as to prevent contraband traffic. Other practical suggestions were, that captors should be allowed to trans-ship alleged contraband to their own vessel (Mr. Everett P. Wheeler of New York), and that pre-emption should be the universal rule (Mr. Eugene Carver of Boston).

The subject of the extent to which subordinate corporations such as self-governing colonies, States and Provinces,

are included in the scope of engagements entered into by the supreme treaty-making Power, provoked the most lively discussion of the three days, as was only to be expected. Few speakers referred to the Newfoundland question; but that of California was clearly present to the mind of all. The question, after all, is one of interpretation. Few will deny that the organ which is internationally alone in touch with foreign Governments can, if it expresses itself clearly, bind the whole nation. The question is, what does it bind it to? Does it, by conceding certain rights within its limits in general terms, concede them in defiance of private rights? or of corporate rights? or of State rights? It *may* do so: but is it likely to have done so? It is a question of fact. A paper by Mr. Everett P. Wheeler (New York) was disposed to answer this question in the affirmative, so far as subordinate States are concerned: and it proceeded to the position that, constitutionally as well as internationally, the Senate of the United States had power to bind the individual States by treaty. As was natural, this thesis aroused the warm opposition of the South. The discussion which followed showed that the doctrine of State Rights is not dead: and Mr. Justice Hodgins (Canada), who, in a pamphlet lately published by him, deprecated the claim of the Crown to interfere with the legislature of Newfoundland, drew attention to the care with which British treaties generally reserve the rights of the self-governing colonies.

Another aspect of treaties was brought before the Conference, in a paper by Sir Thomas Barclay, upon a variance which has arisen between the United States and Europe, in the interpretation of the "most favoured nation" clause in commercial treaties. Such clauses provide that the contracting State shall enjoy all privileges which may be granted to another. But suppose they are granted in return for some concession on the part of the State to

which they are granted? Can the contracting State claim to enjoy the privileges so conceded to its sister-State without making the corresponding concession which the latter has made? It may have already made it. What is the position in such a case? Must it concede something else as an equivalent? and if so, what? Sir Thomas Barclay traced the United States doctrine as far back as 1831, and pointed out that all treaty concessions are motivated by some consideration. The results of the admission of the United States doctrine would be, that no privilege could be claimed under the most favoured nation clause, unless it were granted in the first instance as a purely spontaneous favour. After discussing the cases of *Bartram v. Robertson* and *Whitney v. Same* (124 U. S. 190), he concluded that the American interpretation could not logically be supported, and recommended that the Hague tribunal should be given unlimited jurisdiction in such matters.

On the concluding day, a discussion of the "Drago" doctrine was initiated by Chief Justice Baldwin, in a paper which unreservedly accepted Dr. Drago's views. Mr. Hamilton, K.C., took the same course, and no dissent was expressed by any other speaker. The whole question is, of course, only a branch of the general subject of the treatment of individual foreigners by States which have in some way the power to injure them. They may injure them by maltreating their persons, by failing to protect their property, by declining to fulfil their engagements with them, and in numberless other ways. This branch of International law has received very little attention indeed. But with the increasing numbers of foreigners who settle in strange countries, and the increasing vigour with which they insist upon their absolute right to do so, the limits of the duties which the government of the place they honour with their presence is under towards such immigrants are become correlatively more and more

in need of ascertainment. It used to be said that the only requisite was, that they should not be treated worse than the country treated its own subjects in the elementary matters of safety of goods and person, and that they should not be treated with gross cruelty (even, presumably, when the native was). In this wider and most important aspect, the subject was dealt with in a clear and comprehensive fashion by Mr. Gaston de Leval (Brussels). Another topic, that of Double Imposts, which has still to receive proper official consideration, was lucidly treated by Dr. Ernő Wittmann (Buda-Pesth), and the method proposed for the avoidance of double death duties was, that they should be levied by the State within whose territory the property itself was locally situate. This is a welcome return to the ancient and simple rule of the *lex sitūs*.

The remaining subject on the programme, the Taking of Evidence Abroad, was introduced in a paper presented by Dr. A. Hindenburg (Copenhagen), who recommended, as he did at the Glasgow Conference in 1901, that the Dano-Norwegian system (under which such evidence can be taken *de plano*, without the necessity of obtaining any preliminary order of the Court before which the evidence is to be laid) is worthy of trial by other countries.

The beauty of the Coast of Maine is not sufficiently known in the Old World. Its scenery is rendered most picturesque by the lofty cliffs and archipelago of islands, which are its prominent features. The Association had excellent opportunities of seeing something of this charming American playground on the occasion of a cruise among the myriad islands of Portland Harbour, followed by an informal festivity, which was organised in the joint honour of the American Bar Association and the International Law Association by the Cumberland Bar Association. The members of the International Law Association were also the guests of the American Bar Association at their annual

banquet, at which the guest of honour was the British Ambassador; and also of the Hon. Judge Putnam, of the United States Circuit Court of Appeals. The arrangements for the reception of the Association were made by the Cumberland Bar Association, whose President, Mr. C. F. Libby, was, at the conclusion of the Conference, elected a member of the Council of the Association, in company with Mr. J. Parker Kirlin of New York, Mr. Eugene Carver of Boston and Dr. Schneider of Berlin; and Mr. Alton B. Parker, late Chief Justice of the Court of Appeals of New York, and President of the American Bar Association for the meeting, was added to the list of Vice-Presidents.

No pleasanter or more useful Conference has been held by the Association, and the hospitality and kindness shown to its members could not have been surpassed.

The presence of delegates from the Bar of Montreal was an important sign of Canadian interest in the Association's work, and suggests the possibility of the next Conference to be held in America being at one of the principal cities of the Dominion.

T. BATY.

VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

Spitzbergen.

SINCE the African partition of 1885, which Lord Granville's biographer not unfairly claims as that statesman's most enduring monument, it has seemed that there could be little scope in future for the application of the doctrines relating to the acquisition of unoccupied territory. Should any nation relax its hold on any portion of its land—a very improbable idea—there might arise cases in which these doctrines might again have to be invoked. Should America or

China—again an unlikely hypothesis—commence to colonize Africa in the face of the Pan-European convention, these rules might still be useful. But there remained, after that convention had been concluded, little of the earth's surface which had not been for all practical purposes *in esse* or *in posse* appropriated. Still, there was left the frozen north. To this day the Polar regions have been regarded as not worth the trouble of dividing. And the position may at any time become acute with regard to the island of Spitzbergen. Spitzbergen lies in lat. 77° N., between the Pole and Norway. It really consists of a group of three principal islands, of which the largest, West Spitzbergen, roughly resembles in outline Great Britain joined to Ireland, and measures some 250 miles long. Uninhabited by permanent settlers, it has on various occasions offered a winter's chilly hospitality to distressed mariners or hunters; for although it produces no shrub larger than the bilberry, its fauna comprises herds of reindeer, besides walrus, seal, and other amphibious creatures. Temporary visits have long been paid to the island by Russians, Norwegians, and Dutch, in pursuit of these; and above all by whalers. The latter have even erected sheds and huts. But no government has directed their operations or claimed the control of their acts *ratione loci*. The small hotel recently built flies the flag of Norway, but without any governmental order or authority.

At the present time, however, it would seem unlikely that this state of affairs can indefinitely continue. The desire to get quickly and safely off the beaten track, while at the same time avoiding the summer heats, has made Spitzbergen a welcome hunting-ground for the tourist. Unfortunately, the island is very literally made a hunting-ground. There is no check on the slaughter of beast or bird; and, indeed, the attractions of the butchery of the reindeer and the walrus in Spitzbergen are occasionally set forward

as inducements to participate in the cruises which are made to its shores. The U. S. Consul-General at Christiania says that :—"The animals are being wantonly exterminated"; and instances a case in which a party of tourists in 1906, killed over 100 reindeer, leaving the carcasses where they fell. He adds that the walrus is now nearly extinct, and that the ptarmigan, eider-duck, and other birds are threatened with the same fate. Besides, the multiplication of shooting-parties is likely to lead to unpleasant incidents, in the absence of all law. • Perhaps a good solution might be found in the instalment of an independent scientific commission as rulers of Spitzbergen; but it is hardly probable that events will so far depart from traditional lines. It seems certain, at all events, that no nation has any prior rights there. The insular position of the territory is sufficient to prove this. Neither Britain in right of Canada, Denmark in right of Greenland, nor Russia itself, is in a position to claim Spitzbergen as an appurtenance. Denmark, indeed, used to claim wide tracts of sea in the neighbourhood of the Frozen Ocean: but this claim hardly extended to islands, and, moreover, was made when Norway was in Danish hands as well as Iceland. Nevertheless, the moral claim of Denmark would, on historic grounds, be worthy of consideration—if such grounds had much weight now-a-days, and if she ever urged them; and it should be remembered that at one time the islands were not distinguished by geographers from Greenland.

If mere discovery were held to give a right to sovereignty, it would probably fall to the Russians or the Dutch. But the power which has actually the strongest connection with Spitzbergen is neither Holland, nor Britain, nor Russia, nor Denmark—but Norway. It is Norsemen who have set up their buildings at Advent Bay, an inlet of Ice Fiord, and it is the flag of Norway which alone

appears to have floated from year to year in the island. It might be hastily concluded that this consideration is sufficient; that there is nothing for other nations to do but to retire gracefully and hold Norway responsible for the reasonable safety of the place. That would be to go a great deal too far. There are two limitations on the effects of what has been done by Norwegians: in the first place, there must be something like a real colonisation for such private acts to have any effect at all; in the second, they can only affect the immediate region concerned. It is impossible to annex the twenty-third largest island of the world by putting up a fish-curing house in one corner. One can hardly resist the conclusion that the colonization of a portion of Advent Bay by persons displaying the flag of Norway is sufficient in point of extent, even if the occupation is suspended during the winter. Some regard must be had to the local circumstances of the region. Constant resort to the same locality, year after year, should be accepted as enough, without requiring continuous presence. On the other hand, Advent Bay is only a very small corner of Spitzbergen. Outside the limits of the settlement, or quasi-settlement there, the islands are unaffected by Norwegian rule. But what are its limits? The ordinary doctrine of the watershed inland, and the river-mouth coastwards, are oddly out of place in a land of perpetual ice. Besides, they are rather rules for the delimitation of boundaries between existing settlements, than for ascertaining the places available for new ones. It will probably be found that the limits of this elementary Norse settlement are very narrow indeed: they cannot be extended beyond the land actually used by the settlers, with a fair margin for expansion. This would include the site of the buildings, the shore comprising the landing places, the intervening land, and any of the other adjacent soil which is necessary for the needs of the denizens, or which is, in fact, habitually traversed by them for hunting, exercise, or

any other purpose. To consider the whole of Ice Fiord, seventy miles long, with its *hinterland* to the hills, barred to the use of other pioneers would be to concede too much. In fact, mining operations are said to have already been commenced in certain localities. (*Daily Consular Reports*, Washington, March 20, 1907.) The prospectors have even remained through the winter. We should add that Sweden has done good work in the matter of exploration, and that a miniature Swedish colony (with a railway!) was established and abandoned in 1872. A curious fact about the reindeer is that many of them are marked: the hunters are said firmly to believe in the existence of an unknown inhabited continent to the N.E.

A somewhat different question would arise if Norway officially laid claim to a part or the whole of these islands, and supported the claim by action. The way would then, *primâ facie*, be barred to all other nations. Only in case of a failure by Norway to exercise actual dominion there after the lapse of a reasonable time, could the locality be regarded as free to others to occupy. And, in a desolate region like this, it would be long before any such presumption could arise. Many tracts of mountain land, in the undisputed possession of Russia or Chili, are as lonely and sterile, and as little likely to be opened up. But here again it would be a question how much territory was affected by the acts accomplished. It has been seen that one cannot annex a great island by allowing one's subjects to put up huts in a corner of it. It is equally futile to affect to annex one by setting up a flagstaff in one locality. When the British and Germans, with Angra Pequena and Walfisch Bay fresh in their experience, started a race for New Guinea, they each proceeded to effectuate their purpose by establishing claims to a continuous series of posts. But the desolation of Spitzbergen is such that it may well be doubted whether this procedure is necessary. If Norway chose to declare the

annexation of the islands, and took upon herself the government of the existing quasi-settlement at Advent Bay, few would quarrel with the proposition that she had thereby acquired a lawful title to the whole of West Spitzbergen, at any rate, with the small islets off its own shores. Whether she would be quite wise in doing so may be doubtful. Transmarine possessions are of no strategic value to a nation which has not a powerful fleet. And if they are ice-bound half the year, their strategic value is almost *nil*. On the other hand, Spitzbergen is for this very reason valueless to Russia. Norway would not be likely to offend that powerful neighbour by annexation. And it would certainly appear desirable that some State should be responsible for the maintenance of order in the islands.

The Second Hague Conference.

ARBITRATION.

By the time these notes are in print the Conference which has sat since last June will have come within measurable distance of terminating its operations. We must therefore take a broad survey of the situation as it stands at the time of writing. The fact that so little has been accomplished is due, first to the unwieldly nature of the Assembly, and, secondly, to the fact that it has attempted far too much. The two causes of failure, in fact, hang together; for, with a more limited programme, there would have been no necessity for the technical and assistant delegates who so enormously increased the number of participants. It might have been foreseen that to further the general substitution of arbitration for war, to solve all the problems of maritime prize law, and to set limits to the methods of naval warfare, besides incidentally giving a finer polish to the already elaborate and badly-observed rules of warfare on land,—was an undertaking which might better have occupied fifteen conferences than

one, however remarkable for size. Of the question of the reduction of armaments, the Conference soon disembarassed itself. They have grown rapidly ever since the last Conference recommended their diminution; and it is to be inferred that they will continue to grow rapidly, since the present Conference concurs in that recommendation. As to the progress of Arbitration, the result of its deliberations is an *impasse* between the views of those who would impose a permanent legal Court upon independent nations, and those who deny that any real analogy exists between the homogeneous and subordinate States of the American Union and the sovereign States who are known to International diplomacy. A North American State is, at all events since the Civil War, no more a State than a British self-governing colony is. Autonomous provinces may quite well be content to accept the dictation of justice from a bench of lawyers. Sovereign States will not. It is a mistake to suppose that all the relations of States are capable of being solved by legal process. A State has its moral duties as well as its legal ones, and the two may be in conflict. To ask it to pledge itself beforehand to perform its legal duty upon every occasion at whatever shock to its moral sense, is merely to endeavour to enthrone law in the place of right.

Arbitrators have a certain latitude of appreciation, and may be empowered to take moral elements into consideration, as our own juries so constantly do. Unfortunately, they are apt to take into consideration elements of expediency as well. Obligatory arbitration is a thing of which nations are accordingly shy. But obligatory reference to a Court, governed by the rigid habits of municipal lawyers, and subject to be swayed by the arts, even by the sharp practice, of advocates trained in "the art of winning cases" is not a thing which any nation, calling itself independent,

could possibly accept. The United States citizen sees a municipal tribunal, his own great Supreme Court, wielding authority over forty or fifty "States": and he asks why there cannot be a United States of Europe, or of the World, with a Supreme Court on the same model. He is confusing two different things: the province and the nation. It is an affectation if an American over here styles himself a Rhode Islander. It is an affectation if a Dane in New York calls himself a European.

Professor Holland has well said that the differences of nations must in the long run be a matter for diplomacy. The rigidity of law Courts needs a corrective. The nation finds it in legislation, or in the executive prerogative. The world must find it in the far more elastic and honourable method of friendly discussion. There are, in fact, various functions confused under the name of Arbitration, for which are required quite different kinds of arbitrators. There is the mere ascertainment of facts. There is the establishment of propositions of law. There is, beyond and above these, the appreciation, in view of the facts and the law, of the proper thing to do. For the first of these functions a Court of judges may be excellent; for the second, a consultation of professors seems preferable; for the third, the atmosphere of forensic and academical life is entirely out of place. The family of nations is a real family; and no one would think of submitting delicate family differences to a Court of law. The Court or the family solicitor will tell the parties their legal rights. But the conciliation of these rights is a matter for tactful and sympathetic friends. The only really useful arbitration is arbitration of this type. Questions of honour and of vital interests can well be laid before such arbiters. Nobody need expect that they will ever be laid before a Court of lawyers. Nations do not stand at arms' length like ordinary litigants, in a world where there are millions of

other nations. They need a family council, not of judges but of friends. Not only the minor Powers, but such States as Austria, protested against any imitation of the United States Supreme Court being set up over them.

AN INTERNATIONAL PRIZE COURT.

The particular rock on which the obligatory arbitration proposals split was the composition of the proposed Court. Less difficulty was felt about accepting a scheme of rotation, in accordance with which States would be represented in varying measure on a Prize Court of Appeal. Here the matter is a purely juridical one, so that the arbitration may properly take the form of a Court. But the very gravest objections exist to the acceptance of any such Court so long as no agreement exists on the fundamental laws of Prize. We are far from saying that no dispute of Prize law should be referred to arbitration. Most certainly, however, the arbiters should be carefully selected by the parties *ad hoc*. Take the question of the destruction of neutral prizes. Russia affects to treat a neutral ship captured for an infringement of neutral duty, as passing *ipso facto*, like enemy's property, to the captor. Needless to say, this is a startling proposition, which could only have come from a nation with trifling experience of commercial war. It is only when the neutral's misconduct is duly proved, and a decree of condemnation passed, that the property in what are *prima facie* a friend's goods, is transmuted. Thus, the United States authorities in 1862 severely censured an officer who had brought in a British neutral as a prize, with the United States' colours hoisted above her own. And condemnation cannot retrospectively validate such insults to the neutral flag. Indeed it is almost enough to show the fallacy of the Russian contention, to point to the fact that a vessel carrying contraband can only rarely be confiscated at all. Suppose, then, that a neutral ship is

sunk by a Russian cruiser. Reparation is called for. Russia replies that the ship was hers by capture, and that she had a right to do what she liked with it. Asked to produce any precedent in the history of the world for such an act, she fails to do so. • This would for practical people be conclusive. But in an assemblage of judges inclined to decide cases without much regard to actual history, and not experienced in maritime war, she is very likely to get her view treated with more respect than it is worth: possibly she may succeed in getting it accepted.

A further provision in the Prize Court scheme which we cannot but consider objectionable, is the clause empowering naval officers to sit *avec voix consultative*. This was originally part of the German proposal, which was ultimately amalgamated with the British one. If it means that naval officers are to be present as Trinity Masters are in our Courts, *i. e.*, as nautical assessors only, it is quite unobjectionable. But then, it might as well have said what it meant. As it stands, it puts the naval side of the case in a position of enormous advantage as against the mercantile. Questions of prize are rather questions of man-of-war *versus* merchantman, than of belligerent *versus* neutral. The neutral of to-day may be the belligerent of next year. In the *Springbok Case* the British Admiralty was lukewarm, because it knew the American decision would be useful to it some day. The private owner has to stand the brunt. Naval assessors will *ex officio* be belligerent advocates. In old days the Prize Court was "the deck of the Admiral's ship." The constant tendency in countries with large experience of naval warfare such as France, Britain, and the United States, has been to eliminate combatant officers from the bench. But now, lawyers to pacify nations, naval officers to advise on matters of law—such appears to be the scheme approved of by the Conference!

It is said that a conference on Prize law will be held in London in about a year's time. The select body of nine nations, which are indicated as the sole participants in this projected discussion, will certainly not be allowed to dictate law to the world, if (as is in the last degree improbable) they agree among themselves. The exclusion of privateers from neutral ports, in which exclusion lay the germ of the whole modern theory of maritime neutral duty, was the work of the minor States of Europe, such as Tuscany, Sicily and Genoa. Prussia was insignificant as a naval or mercantile power when she broached the doctrine, now so widely accepted, of the territorial character of merchant vessels. Holland, in 1863, told the United States plainly that she would decline to take her standard of conduct from them, in the matter of the reception of Confederate cruisers in her ports. These are questions which affect the smallest State as gravely as the largest. Each is entitled to equal consideration.

Those who imagined that it was settled law that a belligerent warship must leave neutral waters within twenty-four hours, will be surprised to find France, Russia and Germany, alike maintaining (with general approval) that no such rule exists. Count Tornielli, for Italy, observed (almost in the words of a *questionnaire* issued by the International Law Association) that the assumed analogy between the internment of a fugitive army and the internment of a warship is fallacious. A foreign army is an anomaly in a peaceful country. A foreign man-of-war is a frequent and welcome visitor.

BRAZIL.

When Marshal da Fonseca in 1889 summarily ejected the Emperor Peter with his aged consort—a couple venerated and admired throughout the world—Brazil fell many

degrees in the estimation of Europe, which had previously regarded it as the model State of South America. It is not too much to say that Dr. Barbosa has restored Brazil to a position of the highest consideration and respect. South America was not invited to the last Conference. The mysterious name of Monroe was darkly whispered when the omission was mentioned. Nothing is more remarkable about the present Conference than the ability and sound statesmanship of Barbosa, Drago, Triana, Esteva, and their colleagues: unless it be the complete demonstration which (as has been said) it has afforded, that the hegemony of the United States on the American continent is a myth. No more strenuous opponents of Mr. Choate's "Supreme Court of the World" scheme, which would have riveted the fetters of legalism on society, were found than the South Americans. Brazil, indeed, joined with Turkey in declining to recognise even the projected Prize Court of Appeal. And with apparent justice; for the composition of that tribunal is by no means ideal.

It ignores frankly the principle of the equality of States; and it does so in a manner which, for a Peace Conference, is, to say the least of it, remarkable. For it attributes increased representation on the Court to nations not only in proportion to their mercantile marine, but in proportion to their warlike force at sea. This is a palpable encouragement of naval expenditure, besides being illogical, for why should a State with a mercantile marine, like Norway, be relegated to an inferior rank simply because she has acted up to the pious wishes of the Conference, and adopted a modest scale of armaments merely for coast defence? Nothing short of absolute equality can really be satisfactory. It is as important to Colombia that correct views should prevail on Prize law as it is to Germany. Colombia claims the right of privateering. What if the Prize Court, in which she has next to no voice, denies her right and releases all her prizes?

SUMMARY.

To sum up, the British proposals have met with little acceptance. Disarmament was not discussed. The abolition of contraband—most ably urged—was not unanimously approved. The States which approved it were, indeed, found to be by no means prepared to embody their approval in a convention which was somewhat bluntly put before them by Great Britain at a semi-private meeting. The liability of "auxiliary" vessels to capture: the "twenty-four hours" rule in its rigidity: the interdiction of commissioning ships at sea: even the interdiction of contact mines, met with scant support. Nor were the United States more fortunate. The "High Court" which they wished to substitute for the Arbitration Tribunal can only exist as an alternative to it, if it is ever formed. Obligatory resort to either body is still unrealised. The Porter amendment to the Drago doctrine, reserving an implicit right to resort to force for the collection of the duly allowed debts of one's subjects, was bitterly opposed by the South Americans, who were supposed to be the trusty vassals of the North. Germany, on the other hand, has had all her own way, when she chose to indicate it. Austria in the main fulfilled her function of second. Japan supported Britain, Montenegro Russia. France and Italy temporized. Portugal occupied a more prominent place than had been looked for. But the main honours lie with Germany and South America. It should be added that useful work was done in the way of elaborating the procedure of the Commissions for Establishing Facts (*Commissions d'Enquête*). De Martens has referred to these Commissions as the most promising of the plants which were set at the prior Conference, and the prudent gardeners have not omitted to pay attention to them accordingly. It might be wished that the same good practical work could have been done in a field which decidedly needs it—the conduct

of warfare on land. It is common knowledge that the more diplomatists refine the precepts of war codes, the more lamentably do the facts fail to correspond with the law. It is only in ignorance that the view can be held that the British operations against the Boers carried out either the letter or the spirit of the First Hague Convention. The slender excuse is no doubt available that the Transvaal was not a party to it. That excuse does not hold good in the case of China, where the Convention was openly violated at every turn. Perhaps the excuse there was that the Allies were not engaged in war, but only in peaceful hostilities and that consequently there the Convention did not apply! We have elsewhere suggested that the employment of numerous foreign *attachés*, to accompany the belligerent armies, might be of some use in this connection. It is worse than futile to elaborate rules which are hardly ever observed in their simplicity.

T. BATY.

IX.—NOTES ON RECENT CASES (ENGLISH).

WE have before commented on the steady diminution in the volume of Chancery reporting. These reports during the months of August, September and October, this year, fill less than a hundred pages of the Law Reports. This may, in the present case, be partly due to the fact that both divisions of the Court of Appeal were during Trinity term taking Queen's Bench appeals; but that is insufficient to account for the continued subsidence of the flood. That seems to arise from the reporters becoming alive to the fact that a decision should be reported only when it decides a principle. Neither Chancery reporters nor Chancery judges have been in the past as solicitous as their brethren on the Common law side, to distinguish points of fact from points of law.

This is seen best in decisions on the interpretation of documents. Technically, all such decisions are on points of law, and the reporters treated them as if they were really so. But, in ninety-nine out of a hundred cases, all that the Court decides is, that a particular document has a particular meaning. It does not follow that another document almost the same, or another document precisely the same, but made under different circumstances, will have the same meaning. Nevertheless, Chancery lawyers constantly act on the assumption that it does. The result is, that the majority of the reports of the interpretation of documents are devices for misleading the unwary. The tendency to limit the reports of such cases is therefore one to be encouraged.

The only case on the interpretation of wills reported in the last three months is an evidence of the evils arising from interpreting documents by precedent. In *In re Gorringe, Gorringe v. Gorringe* (L. R. [1906], 1 Ch. 319), a testator, after giving legacies to the children of A. "my deceased son," left the residue of his property to his children who should be living at his death, "provided that in case any one or more of my children shall predecease me leaving children," the parent's share was to go to such children. No human being untrammelled by precedent could doubt that what the testator meant (and said) was, that his children living at the time he made his will were to take the residue, and in case any of them predeceased him leaving children, his share should go to such children. And so Joyce, J., held. The Court of Appeal, however, Romer, L.J. dissenting, (L. R. [1906], 2 Ch. 341), dragged in *Loring v. Thomas* (1 Dr. & Son, 497), and on the strength of it held that the children of the deceased son were also to take. Now the House of Lords (L. R. [1907], A. C. 225), have unanimously restored the decision of Joyce, J.

The jealousy with which the Court protects the trustee who acts rightly, and removes the temptation for him to act wrongly, is well illustrated in *In re Turner, Wood v. Turner* (L. R. [1907], 2 Ch. 126) and *Nugent v. Nugent* (L. R. [1907], 2 Ch., 292). In the former of these certain *cestuis que* trust brought an action for the administration of the trusts against the trustees. This action had the result—which such actions have been known to have before—of dissipating the trust property until not enough was left to pay the costs of the action. The solicitor for the *cestuis que* trust, thereupon, applied for an order under sect. 28 of the Solicitors Act 1860, charging their costs on what remained on the somewhat humorous ground that it was property “preserved” by the action. Kekewich, J., held that the costs did come within sect. 28, but deprived this decision of all effect by holding that the trustees’ right of indemnity out of the trust property was entitled to priority, and the Court of Appeal affirmed his decision on both points. In the latter case (*Nugent v. Nugent, supra*), a receiver to mortgaged property was appointed by the Court. The mortgagee obtained an order to take possession of the property and to exercise her power of sale. She did not take possession, but she did sell by public auction. The receiver purchased. There was no allegation of fraud or inadequate price. Held, that the receiver was merely a trustee of the property for the mortgagors.

Before the Land Transfer Act 1897, the costs of an administrative action involving both realty and personalty were thrown upon the realty, in so far as they were “exclusively occasioned by the administration of the real estate,” and this rule was not altered by a direction in the will that all “testamentary expenses” were to be paid out of the personalty (*Patching v. Barnett*, 51 L. J., Ch. 74). These costs were then not testamentary expenses (*per*

Jessel, M.R., *ibid.*), but since the Land Transfer Act 1897 they are. In *In re Jones* (L. R. [1902], 1 Ch. 92), Buckley, J., held that this fact does not alter the incidence of such costs where there is no direction in the will that all testamentary costs are to be paid out of the personal estate, and now in *In re Betts, Doughty v. Walker* (L. R. [1907], 2 Ch. 149), Kekewich, J., holds that it does not even where there is such a direction, unless it is very specific.

The Act 13 Eliz., c. 5, was passed for the purpose of preventing assignments of property intended "to delay, hinder, or defraud creditors and others of their just and lawful actions," etc., and therefore the only assignments coming within it are assignments of property which may be taken in execution of a judgment in an action (*per* Lord Cottingham, L.C., in *Norcutt v. Dodd*, C. & P. 100, at p. 102). But property—such as reversionary equitable interests—which formerly could not be taken in execution can now be reached by charging orders under sect. 14 of the Judgments Act 1838, and by equitable execution by the appointment of a receiver, which latter does not charge the property, but acts as an injunction to prevent the defendant himself from dealing with it to the prejudice of the creditor (*per* Swinfen Eady, J., in *In re Marquis of Anglesey* (L. R. [1903], 2 Ch. 727, at p. 731). And where property can be reached by either of these processes, a fraudulent settlement of it is now within 13 Eliz., c. 5 (*Ideal Bedding Company Ltd. v. Holland* (L. R. [1907], 2 Ch. 157).

Bagot v. Chapman (L. R. [1907], 2 Ch. 222), decided two points, one of which is very doubtful. A lady, entitled to a reversionary interest in a fund, executed a mortgage of it containing a covenant to repay the mortgage debt, on the false representation of her husband that the "paper" was merely some sort of an instrument to enable him, in

the future, to raise money on her interest in the fund. On the plea of *non est factum* Swinfen Eady, J., held (1) that the mortgage deed was void, as there was a false representation not merely of its contents but of its character; (2) that whether the whole deed was void or not, the covenant to repay (of which she knew nothing) was void. The second point is contrary to the view taken by Warrington, J., in *Howatson v. Webb* (L. R. [1907], 1 Ch. 537), but his lordship's attention in that case was not called to *Pigot's Case*, 11 Rep. 26b, 27b. But surely it is a very dangerous and unsound doctrine to hold, that when a person executes an instrument which he knows refers in some way to his property without ascertaining what it is, he is not bound by it, because it is a different instrument for what it is represented to him to be? When the "character" of the instrument is referred to, surely what is meant is the whole object of the instrument? In what respect would the lady here have been worse off had the instrument been what it was represented to her to be, and her husband had subsequently used it to raise money on her interest in the fund?

If *Jenkins v. Price* (L. R. [1907], 2 Ch. 229) is good law, lessors whose consent (not to be unreasonably withheld) is necessary to assignments by their lessees must be careful in their dealings. There, a lessor asked to consent to an assignment of the lease of a public house answered in effect, "I consent to your assigning to a private person, but if you want to assign to a brewery firm I will require a new lease to be taken and a higher rent paid." The lessor acted thus, simply to protect his own interests, and therefore reasonably; but it was held that the condition was a fine within the Conveyancing Act 1893, s. 3, and making his consent subject to it, was "unreasonably withholding it." The effect then of sect. 3 would seem to be,

that where a lessor objects honestly to a certain class of assignees, he had no middle cause between consenting or refusing absolutely to consent to an assignment to them.

Note, it has been held (1) in *In re Heath, Heath v. Widgeon* (L. R. [1907], 2 Ch. 270), that under sect. 1 of the Intestates Estates Act 1890, a widow of an intestate without issue, who died in 1894 with practically no assets save a reversionary interest in realty then of no market value, was absolutely entitled to such reversionary interest when it unexpectedly fell into possession in 1904, and was then worth £3,500. (2) In *In re Wedmore, Wedmore v. Wedmore* (L. R. [1907], 2 Ch. 277), that the forgiveness of a debt by a testator is equivalent to a specific legacy of the amount of the debt, and so on a deficiency of assets abates only with specific legacies. (3) In *Whitmore-Searle v. Whitmore-Searle* (L. R. [1907], 2 Ch. 332), that an assurance by a tenant-in-tail for the purpose of barring the entail operates to effect this, even though the protector does not give his consent till after the death (within six months) of the tenant, provided he gives it by executing the tenant's assurance. *Sed quære* : Is there any disposition under the Fines and Recoveries Act 1833 until the protector consents, and if there was no such disposition made during the tenant's life, how can one be made after his death?

J. A. S.

Another good illustration to sect. 37 of the Bills of Exchange Act 1882, is furnished by *Glenie v. Bruce Smith* (L. R. [1907], 2 K. B. 507). The defendant had agreed to guarantee payment of goods supplied by the plaintiff to a debtor, who accordingly wrote an acceptance across the face of two stamped bill forms, which were then indorsed by the defendant and handed by the debtor to the plaintiff, who filled up the forms for the agreed amounts,

signed them as drawer, and indorsed them : in one instance above the indorsement of the defendant. Liability on the bills was decided in *Wilkinson v. Unwin* (L. R. [1881], 7 Q. B. D. 636), and in *Jenkins v. Coomber* (L. R. [1898], 2 Q. B. 168). But, earlier than those deciding cases, the law had been well expressed in *Byles on Bills* : " If a bill be re-indorsed to a previous indorser he has in general no remedy against the intermediate parties, for they would have had their remedy over against him, and the result of the action would be to place the parties in precisely the same situation as before any action at all." The object of this rule of law is to prevent circuitry of action. But that excellent treatise, the pioneer of the Bills of Exchange Act, goes on to say that when a holder has previously indorsed, and the intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser. Sect. 37 of the Act expresses this very tersely. Such a case would be one where no consideration had been given. *Glenie v. Bruce Smith* fulfilled this condition, for, as A. T. Lawrence, J., pointed out, there never in fact was a time when the defendant could have sued the drawer on the bill, and therefore there could be no circuitry of action. The defendant received no protection from sect. 56 of the Bills of Exchange Act, for though the bills were signed in blank, and therefore come under sect. 29, yet they were prepared in accordance with the defendant's own agreement. Nor did the Statute of Frauds afford him any relief, for though no " memorandum or note " of the guarantee was in writing, the action was not on the guarantee but on the bill.

The wing of misfortune seems to have shadowed the plaintiffs persistently in *Lacons & ors. v. Warmoll* (L. R. [1907], 2 K. B. 350 ; 76 L. J. R., K. B. 914). Under a guarantee

given to them by a testator, they proceeded in a County Court against one of his executors who more than five years before any claim arose under the guarantee, and more than six years before action brought, had transferred the balance of the estate to the residuary legatee, who was his co-executor, and was also the person guaranteed. It is as easy to do the wrong thing, as the right; possibly even more so sometimes. The plaintiffs might, on the decease of the guarantor, have required new arrangements to be made, or they might have stipulated for some reservation out of the residuary fund. At any rate, they might have commenced their action as soon as there was an encroachment upon the guarantee. But unfortunately for them, they delayed till the Statute of Limitations had grown up into a barrier, and then proceeded against one only of the two executors, and for a debt owing by the testator. Such a claim could be met out of the assets only. But their discomfitures were not over, for the County Court judgment, ranging far outside the plaint, made the defendant personally responsible on the ground of *devastavit*, which was not alleged. It was inevitable that this should be reversed; but even now the Court of Appeal seem not to be agreed as to the remedy of the plaintiff in such a case and the protection of the defendant; for one judge appears to think that if the plaintiff had proceeded against both executors in an administrative action the Statute of Limitations would not have applied; and another is of opinion that, whatever form of action were adopted, the executors' liability would, under the Trustees Act 1888, be barred at the end of six years from the date of payment. Probably the latter view is the better.

No two judgments could be more definite and more opposite than that of Pollock, C.B., in *New River Company v. Land Tax Commissioners of Hertford* (2 H. & N. 129), on

the effect of redemption of land tax, and that of Lord Esher, in *Metropolitan Railway Co. v. Fowler* (L. R. [1893], A. C. 416). In *Newton, Chambers & Co. Limited v. Hall* (L. R. [1907], 2 K. B. 446), Bray, J., has adopted the view of Pollock, C.B., that redemption relieves from tax all the natural productions of the land, even though their existence was not known at the time. The Land Tax Act of 1797 (38 Geo. III, cap. 5) enacts that all quarries, mines of coal, &c., "shall be charged with as much Equality and Indifference as is possible." The Redemption Act of the following year made perpetual this tax, which before was an annual one. It is very probable that Mr. Pitt meant what Lord Esher enunciates, that if there is an unknown mine, redemption of land tax only redeems so much of the land below the surface as is in its normal condition, and not any new interests which may afterwards arise.

The meaning of "domestic purposes" in the Waterworks Clauses Acts has often been the subject of contention. The "judge and the stockbroker," who formed the Lord Chief Justice's illustrations in *Harrogate Corporation v. Mackay* (L. R. [1907], 2 K. B. 611), will, if they keep motor cars, approve of the decision which held that the defendant, a doctor, was entitled to the use of water for washing his car without extra charge.

T. J. B.

SCOTCH CASES.

Judgment was recently given in two cases connected with Bills of Exchange. In *Lawson's Executors v. Watson* (44 S. L. R. 846), the document founded on was in the form of a bill, but it lacked the drawer's signature, although it was dated and addressed from his house and was found in his repositories after his death. The acceptor and the presumed drawer had long been in the habit of transacting

business together, but when sued for the amount apparently due the defender maintained that at least, since the Bills of Exchange Act 1882, the instrument could not be treated as a proof of indebtedness. The Court held that while the instrument was not a bill of exchange it was a valid proof of resting owing.

The case was raised in the Sheriff Court at Kirkwall, and was dismissed by the Sheriff substitute. On appeal the Sheriff Principal (M'Lennan), reversed this judgment after a long and interesting review of the authorities, and finally the latter judgment was affirmed by the newly-formed Extra Division of the Inner House of the Court of Session. It was argued in the final appeal that the Act of 1882 had displaced the early authorities on which the Sheriff had founded his judgment, and that, even if the early cases were still to be regarded, they differed from the present in respect that the name of the creditor was discoverable either *in gremio* of the imperfect bills or otherwise from separate documents. To this it was answered that the action was for a debt, and was not founded upon the incomplete bill. Although incomplete it was "writ" under the debtor's hand, and therefore a good document of debt which did not require to be either holograph or tested. It was valid evidence of indebtedness, and therefore the onus was on the defender to prove payment, which he had failed to do. The latter argument prevailed.

An incidental question was raised whether executors could supply the signature of a drawer after his death. The point was not necessary to the judgment, but Lord M'Laren doubted whether they could.

The other case connected with the law of bills of exchange involved also a question under the law of partnership (*Rossland Cycle Co. v. M'Cready*, 44 S. L. R. 863). Two persons who were the sole partners of a firm accepted a bill of exchange in their individual names and without

any reference to the firm. The bill having been protested for non-payment, a charge followed and goods belonging to the firm were poulded. The individuals whose names were on the bill then brought an action of interdict in the name of the firm, pleading the separate *persona* as a barrier against diligence in respect of partners' debts. After a proof, in which it was shown that no other persons were interested as partners, and that the debt was incurred for partnership purposes, the Court refused to interfere with the diligence, and the interdict was therefore refused.

The Scottish law of separate *persona* in partnership formed the basis of judgment in *Brims and Mackay v. M'Neill and Sime* (44 S. L. R. 819). A firm of solicitors in Thurso agreed with a solicitor in Edinburgh to send him business, on the footing of sharing agency fees to the customary extent of one-third. While this business was being conducted, changes took place in the *persona* on both sides. The Thurso firm was dissolved by the death of one of the partners, and a new firm was constituted, of which the survivor of the original firm was one of the partners, and which continued to carry on business under the same firm name. In like manner the Edinburgh solicitor joined a previously existing firm of solicitors in Edinburgh, thus dissolving the old firm and forming a new one. Disputes arose as to the liability of the Edinburgh firm to share fees, and an action was raised by (1) the dissolved firm of solicitors in Thurso, which, according to the rule of partnership, continued to exist for the purpose of winding up; (2) the surviving partner of the old firm; (3) the new firm carrying on business in the same name. The action was directed against (1) the solicitor in Edinburgh as an individual, and (2) his new firm and the individual partners thereof.

It could scarcely be disputed that the action thus brought was effectual to convene all the parties interested, but

objection was taken on technical grounds connected with the *personæ*. The Lord Ordinary (Guthrie) held that the pursuers had a title to sue, but that they had erred in calling the Edinburgh firm as jointly liable with the individual partner as upon a joint account. He therefore dismissed the action as against the firm, but allowed proof as to the claim against the partner. On appeal, the Inner House went a step further and dismissed the action as against both the defenders. The ground of judgment was that the pursuers, the existing Thurso firm, were not the same as the pursuers, the dissolved Thurso firm, each being separate persons in law. The new firm had therefore no joint interest with the dissolved firm, so as to entitle them to sue for the portion of the alleged debt incurred before they came into existence. It had been argued that the two firms could not be regarded as disconnected persons, because the same business had been carried on by them in succession without any break in the continuity. The Court, while admitting the fact as stated, disregarded it as a ground of judgment, in respect that there was no connection between the two firms in so far as regarded debts due to them respectively. No assignation or transfer from the one firm to the other was alleged, and it was well established that, even had such a transfer existed, there should have been separate conclusions for each debt (*Harkes v. Mowat* [1862], 24 D. 701). The judgment is highly technical, and seems to interpose an unnecessary barrier to the speedy and effective administration of the law.

The case of *Brown's Trustees v. Horne* (44 S. L. R. 795), was in its main features technical, but it possesses some incidental points of general interest. It is, for example, illustrative of the extent of the powers of a body of testamentary trustees to employ and pay a co-trustee who acts as law agent of the trust. The general rule is, that unless specially empowered by the testator a trustee cannot

charge for legal services, but in this case the question was not raised by a beneficiary, or by a co-trustee, or by any one directly interested in the administration of the trust. Part of the trust estate had been invested in heritable securities which the trustees had been obliged to take into their own possession, to the extent of drawing the rents and paying the ground annuals and other preferable burdens. In accounting with the owner of the property for their intromissions, the trustees sought to deduct an account for professional services in connection with the mortgaged property incurred to one of their number who acted as law agent. The owner objected, and pleaded the ordinary rule as to solicitor-trustee. It was a sufficient answer in this case that the trustees had special power under the trust settlement "to appoint any one or more of their own number, or any other person, to be law agent or factor for the trust, and to allow the usual remuneration for services rendered." But in giving judgment the Court went further, and were of opinion that, even had this power been wanting, the objection could not be competently stated by a third person. Lord Adam, at a previous stage of the procedure (only now reported), stated the case thus:—"As I understand the law, there is nothing illegal in a body of trustees employing one of their number as agent or factor. It is true that in a question with the beneficiaries under the trust, if the trust deed is silent on the subject, such agent or factor can only recover his outlay on the ground that he is not entitled to make a profit out of the trust. But if the beneficiaries do not object, I do not know that it is in the mouth of any third party to do so."

The case possesses an additional interest as illustrating the terms which in Scotland form a sufficient mandate for the appointment of a solicitor-trustee, and for enabling him to recover the usual professional remuneration. English

conveyancing style-books contain long and anxiously-worded clauses to secure an exemption from the strict legal rule, and, to judge from certain recent English cases, even the longest of such clauses is sometimes ineffectual to carry out the purpose intended. In Scotland very simple words, such as those used by the testator in the case under notice, are sufficient to carry out the intention. The law on this subject was established many years ago by *Good-sir v. Carruthers* ([1858], 20 D. 1141), and *Ommaney v. Smith* ([1854], 16 D. 721). These cases indeed were stronger than the average, in so far as in neither of them was there any express authority for remuneration. In the one, the intention of the testator was implied from circumstances, and in the other, remuneration was inferred where it appeared that such was the understanding of the beneficiaries under the trust.

R. B.

IRISH CASES.

Contracts for the sale of lands are of course *uberrimæ fidei*, in the sense that non-disclosure of a material fact known to the vendor will enable a purchaser to rescind. Non-disclosure of something which it is one's duty to disclose may even assume the graver character of fraud: though it is a matter of some difficulty to establish fraud from the mere concealment of material information in the vendor's possession. These familiar propositions are illustrated by a rather curious case of *Kelly v. Doyle* ([1907], 2 Ir. R. 355), turning on somewhat special facts. A licensed public-house was held for the unexpired residue of a term of years, with some twenty-five years still to run; the landlords were a Board of Guardians, and the rent was £40. It was put up for sale, and the particulars stated that the guardians had passed a resolution expressing their willingness to grant a lease to the vendor for five hundred years at a slightly increased rent. This had been true when the negotiations

for sale were begun; but after the purchase was completed the purchaser discovered that before completion the guardians had rescinded their resolution, and had recommended the Local Government Board to refuse its sanction to the lease. He thereupon sued the vendor for fraud in suppressing the fact of this repudiation. The main controversy in the case turned upon the question, whether the vendor knew of the repudiation before the purchase was completed: and upon this question the jury ultimately disagreed. But it was assumed, apparently, by all the judges before whom the case came—including the Court of Appeal—that such knowledge by the vendor would render him guilty of fraud.

It is a familiar maxim that the execution of a codicil amounts to a re-publication of the will. But, like many other simple maxims, the precise import of this turns out on investigation to be somewhat difficult to determine. Is it, for example, equivalent to making a new will, in the terms of the old one as varied by the codicil, and bearing the date of the codicil? This question was considered in *In re Moore, Long v. Moore* ([1907], 1 Ir. R. 315). The Irish Charitable Donations and Bequests Act 1844 provides in effect, that any gift by will of lands for charitable purposes shall be invalid, unless the will is executed at least three months before the testator's death (sect. 16). Here a testator, by a will executed more than three months before his death, made a charitable gift of lands. Subsequently, and within three months of his death, he made two codicils, giving certain additional bequests which reduced the residue; but otherwise he confirmed his will. The question then arose, was the re-publication, implied from making the codicil, "an execution" of the will within three months of the death, so as to invalidate the charitable gift? There was no reported authority on the point, but the Court held that the gift was not invalidated. The rule which it laid down as to the effect of a codicil was, that

it is "an instrument for effectuating a testator's intentions by ascertaining them down to the latest date at which they have been expressed." On that principle, its effect could not be to defeat that which had originally been, and continued to be, his intention—the making of a charitable gift. The decision appears at all events to be sound common-sense, and it would have been a pity if the law had been otherwise.

Our old friend, the "rule in *Dearle v. Hall*" (3 Russ. 1), came up neatly for application in *In re Kinahan's Trusts* ([1907], 1 Ir. R. 321). Successive assignees of an equitable interest take priority *inter se*, not according to the dates of the assignments to them, but by the dates when notice of such assignments was given to the trustee. In the present case, the subject-matter of the assignment was the interest of one of the next-of-kin of an intestate in the unadministered assets. What the case decides is, that notice only becomes effectual when given to an administrator after administration has been taken out; notice given before administration to a possible or future administrator is of no avail. The reason is, that giving notice is only a mode of taking what has sometimes been called "equitable possession"—possession of a subject-matter incapable of other possession. Now in equity, an expectancy is capable of being notionally possessed in this way; but not even in equity can an expectancy or possibility be possessed until it has materialised. That is, it must have a legal holder: and notice given to some one who is not yet, but who afterwards becomes, legal holder, is nothing. The Court, it may be added, thought that the case was really governed by *Addison v. Cox* (L. R. [1872], 8 Ch. Ap. 76.)

Two principles are well-known to be applicable to the law of trusts as well as to the law of gifts, namely: (1) that

equity will not perfect an imperfect gift by treating it as a declaration of trust, and (2) that where a donor intends to make a gift or trust ambulatory or revocable till death, that can only be done by a writing executed as a will. These are well illustrated by the curious case of *O'Flaherty v. Browne* ([1907], 2 Ir. R. 416.) The facts are too peculiar and complicated to be worth setting out here.

The eccentricities of testators are unending, and display themselves not merely in the expression but in the execution of their wills. *In the Goods of Ellison* ([1907], 2 Ir. R. 480), is a case on attestation. A careless testator made his own will, leaving a space blank for the names of the executors. He then signed it and took it into his bank, where he acknowledged his signature in presence of two of the bank porters, whom he requested to sign as witnesses. The place which he pointed out for their signature was the place which he had left blank for the executors' names. But the witnesses did sign there in his and in each other's presence; and this was held a sufficient execution to satisfy the Wills Act.

Pearson v. Corporation of Dublin ([1907], 2 Ir. R. 537), is a decision of the House of Lords at present reported only in the Irish Reports. It is noteworthy for an authoritative pronouncement on that much criticised case, *Cornfoot v. Fowke* (6 M. & W. 358). That decision, it is now declared by Lord Halsbury, "is not law if it is supposed to affirm a proposition, that principal and agent can be so divided in responsibility that the united principal and agent might commit fraud with impunity." It does not matter which possesses the guilty knowledge or which makes the incriminated statement—if those two factors co-exist, apparently there is a fraud for which the principal is responsible.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Railway Rates and Charges Orders. By H. RUSSELL. London: Stevens & Sons. 1907.

Mr. Russell has selected a difficult and technical branch of law. He deals with the law under the Railway Rates and Charges Orders Confirmation Acts 1891 and 1892, and the Railway and Canal Traffic Act 1894. By these Acts are regulated the rates and charges which railway companies are entitled to charge and make for the carriage of merchandise on their railways. A systematic treatise on this subject is certainly likely, as Mr. Russell hopes, to be "useful to traders as well as to the officials of railway companies who deal with rates"; but it is "chiefly intended for lawyers who are called on to advise either railway companies or traders." All the difficult questions connected with "conveyance," "terminal services," "reasonable facilities," are carefully considered, and all the cases on the subject cited and compared; pages are filled up with the classification of merchandise traffic. Some of the difficulties in the way of construing parts of the orders may be appreciated by reading the notes on the measurement of timber, and perhaps a reader will be inclined to agree with the language of the late Mr. Justice Wright, in the case of *G. W. Ry. Co. v. Lowe*. "This is not a case in which it is desirable to give too many reasons, because the problem which we have to solve, is, in truth, unsolvable if we try to follow out the language of the Act or Provisional Order that we have to deal with."

The Tariff and the Trusts. By FRANKLIN PIERCE. New York: The Macmillan Company. 1907.

The object of this book is to state "the injustice of the Dingley Tariff." Mr. Pierce, who is a member of the New York Bar, aims at reviewing this subject from the standpoint of the consumer, not, as most protectionist writers have done, from the standpoint of the producer. He points out that the protection which was intended to foster infant manufactures is no longer needed, and that the United States have during the last thirty years attained a superiority over all other peoples of the world, due to the efficiency of their

labour, the large use of labour-saving machinery, unlimited supply of raw materials, and low rate of taxation. Yet in despite of this, there has been a steady increase in the price of the necessaries of life. "By ingenious methods a few hundred men have destroyed our chances for cheap commodities, and have been able to take the consumers' money, without their knowing it, under the specious guise of a protecting tariff." After discussing the duty on wool and woollen manufactures, the operations of the United States Steel Corporation, and various other duties, the Author comments as follows:—"The duties are mysteriously incorporated in the price of about everything which the mechanic, the farmer, the house-builder and the housewife buy. They do not add a dollar to their worth, but are simply a private tax permitted by government to the safeguarding and increase of the income of profit of a few hundred manufacturers and wool-growers, who have succeeded in maintaining for their own advantage this confusion between public and private right." Mr. Pierce's argument is shortly this, that the existence of the protective tariff favours the creation of Trusts and the consequent exploitation of consumers, by the addition of nearly the whole of the tariff to the cost of production. Among other evils, the organisation and operations of these Trusts lead, in his opinion, towards State Socialism, to which he is strongly opposed. Another evil for which Trusts are largely, in his opinion, responsible is, the decadence of the American merchant marine, as to which he adduces some remarkable figures. But the worst evil of all is, as he says, the effect on the public virtue. The means by which Trusts attain their legislative ends are various. They purchase Congressmen; they supply large sums to the campaign chests of the different parties on implied conditions not difficult to imagine. "Another source of corruption is found in the fact that United States Senators and Representatives are themselves frequently owners of manufacturing interests which are largely affected by tariff legislation." "The control of newspapers by special interests and Trusts is a most dangerous result of protective tariffs." Other evils which Mr. Pierce brings forward as resulting from Trusts are national extravagance, tariff wars, centralization of government, and destruction of patriotism. Other chapters contain special appeals to Manufacturers, Labourers and Farmers. The only chapter we have space to refer to is the one on the tariff in Germany, which contains an interesting account of Germany's advance towards free

trade, and subsequent return to protection, culminating in the von Bulow Tariff passed under the influence of the agrarians. The whole book is well worth reading carefully.

The Common Law of South Africa. Vol. IV. By MANFRED NATHAN, LL.D. London: Butterworth & Co. Grahamstown, Cape Colony: The African Book Co. 1907.

When we reviewed the third volume of this work in our February issue, comment was made on the length of the book. Now Mr. Nathan brings out a fourth volume running to some two thousand seven hundred and seventy pages of text, or some eight hundred pages more than its predecessor. The learned Author assures us that the present one is the concluding volume, so now one is entitled to comment on the work as a whole. The practitioner who looks up a point will, undoubtedly, have to go through all four volumes in order to make sure that no information has been missed. The Author can, however, hardly be blamed for this, as he has followed very closely the arrangement adopted by Voet. The only suggestion that appears capable of overcoming the difficulty would be to have a complete key published to all four volumes. This would enable the searcher to see in which volume or volumes appeared fragments of the subject-matter of his quest. The present volume is divided into three parts. Part IX treats of the Law of Civil Procedure, Part X of the Substantive Law of Crimes, and Part XI of the Law of Criminal Procedure. Under the first named come such important matters as the Superior Courts of Justice, Jurisdiction of Courts, Domicile, and other incidents affecting Jurisdiction. Actions at law and everything incidental thereto, and Execution of Judgments, also appear thereunder; in fact, Civil Procedure is exhaustively dealt with in every phase. We quite agree with Mr. Nathan, in thinking that there was much wanting in the arrangement of the subject adopted by ancient writers on Crime, although perhaps Matthæus might not be included in this condemnation. The Author has made his own scheme, and it seems to be very successful. There have been collected all the statutes bearing on this subject in all the colonies of South Africa, a method which will prove very useful both to the student and practitioner who wish to contrast the law of Crime therein existing. Taking a comprehensive view of the whole book, one is bound to say that the amount

of labour expended upon it is colossal. Mr. Nathan's knowledge of law is well known in South Africa, and from the store-house of his knowledge he has drawn extensively in the preparation of this treatise; whether he will be repaid for it time alone can tell. That the work itself is monumental cannot be denied, and so is the price, a fact which will place it beyond the reach of many a student. Of course, mistakes must creep into a treatise of such magnitude, such as placing sect. 2626 under the heading of Excusable Homicide, and misquoting "*quot homines tot sententiæ*" in the Preface. But such minor matters do not, and cannot, detract from the general excellence, an excellence which will place Mr. Nathan in the front rank of legal writers, both in South Africa and elsewhere. For one man to have digested and brought up to date the principal work of Johannis Voet is a thing to be proud of, but for one man to digest, not only Voet, but also Carpzovius, Damhouder, Matthæus, and other writers in the original, is a remarkable feat. As a work of reference, Mr. Nathan's book stands far ahead of anything of the sort in South Africa, and is likely to occupy that position for some very considerable time to come.

The Annual Practice, 1908. 2 Vols. By T. SNOW, M.A., C. BURNEY and F. A. STRINGER. London: Sweet & Maxwell.

The A. B. C. Guide to Practice, 1908. By F. A. STRINGER. London: Sweet & Maxwell.

The Yearly Practice of the Supreme Court, 1908. 2 Vols. By M. MUIR MACKENZIE, T. WILLES CHITTY, S. G. LUSHINGTON, M.A., B.C.L., and J. C. FOX. London: Butterworth & Co.

The *Annual Practice* is so well known to lawyers throughout the British Empire, and its merits so well established, that words of praise are superfluous, and it has got beyond the range of criticism. Year by year, the learned Authors keep their fingers firmly fixed upon the pulse of Practice. Carefully do they note any changes, however slight, in the condition of the patient. During 1907, this condition has been normal and subject to very slight variation. For the first time appears the Revenue Practice of the King's Bench Division, ably prepared by Mr. J. Johnston of the King's Remembrancer's Office. This gentleman, seconded by Mr. H. A. Hance, Chief Clerk in the same Department, has probed deep into old forms and precedents, expending much careful thought and skill

upon his laborious research. Another new feature is the appearance of the Solicitors Act 1906. The new Rules of the Supreme Court of August 3rd, 1907, appear under and are incorporated in Orders 37 and 63. Judicial decisions have necessitated alterations both in the practice of the Writ and Judgment Departments, and in the practice as to applications for a charging order in the King's Bench Division, both of which facts are carefully noted in the present edition. Mr. Gordon Simpson, of the Contentious Department of the Principal Probate Registry, whose name is becoming so familiarly associated with Probate Practice, has undertaken the task of looking after the notes relating to his special Department, and well has he acquitted himself of his onerous task. Mr. B. D. Kilburn has arranged a special Admiralty Index according to the steps in an action, which will prove of great assistance to practitioners in that Division. The assistance of Mr. Bingley, the active Secretary to the Bar Council, has been invoked to bring the Resolutions of that august body, on matters appertaining to professional etiquette, etc., quite up to date. Many others have rendered valuable assistance in helping to make the *Annual Practice* the monument of accuracy and general utility to the whole legal profession, which it undoubtedly is at the present moment.

The Annual Practice, without Mr. Stringer's *A.B.C. Guide*, would be as sauce without seasoning. Skilfully we are taken thereby through the intricacies of Practice, and it acts as a beacon light to warn the searcher against the many pitfalls yawning at the feet of the unwary.

The *Yearly Practice* has been remodelled and is practically a new work. This fact it accentuates by bursting forth in a new cover of brilliant red. Be that as it may, the names appearing on the title page bear testimony to the fact that the work has been placed in skilful hands. It has taken over two years to work the transformation. The writer of this notice can well believe it, as having had some hand in the work of the original and first number, it is common knowledge to him as to the amount of work and careful thought which was expended on its preparation, and that was many years ago. Since then the accumulation of practice, decisions and notes has been enormous, and any recasting of the *Yearly Practice* would necessitate colossal labour. As to the success of the Revision, it would be altogether premature to express an opinion, time alone can enable one to see the practical utility of the result. If one may

venture one reflection, it would be to express a doubt as to the wisdom of disclosing which of the learned Editors had certain rules apportioned to them. Comparisons are always odious, and such a disclosure leads to comparisons being made. All the Editors of a work should be jointly responsible in the eyes of the world for its production, and it is hardly wise to say, as is said in the Preface, that each Editor is only responsible for the notes, etc., apportioned to him. A distinct improvement⁴ is that a square of black, on the fronts of the pages, marks the beginning of each subject. Speaking generally, one will be content to say, that well-wishers hope for the new model the same success which attended the production of the old.

The Law of Torts. By J. W. SALMOND. London: Stevens & Haynes. 1907.

The work under review is a striking instance, were such needed, of the growth of the Colonies, as demonstrating that the British Empire is a unit within which merit is recognised from whatever quarter it springs. Mr. Salmond is a New Zealand barrister, not called to the English Bar, writing a treatise on an intricate branch of English law, published by a London firm, and recommended to English lawyers for practical everyday use. In a modestly-worded Preface the learned Author recognises the difficulty of his task. The writer has published another treatise: *Jurisprudence, or The Theory of the Law*, a successful work, as is proved by the fact of its having reached a second edition. Mr. Salmond appears to be an academic lawyer rather than a practical one. The present work deals with Torts from a professional or philosophical point of view. Whilst not detracting from the intrinsic value of his labours, it points to its utility to the student rather than to the busy lawyer looking up points. Torts are treated of in a most scientific and scholarly manner, and judged by that standard the work reaches a very high degree of excellence. If one were to point to one instance more than another of its great value, the reader would undoubtedly pick out Chapter X, sect. 97, which deals with the History of the Action of Trover in a manner which may without hesitation be termed as being masterly. His comment on the Trade Disputes Act 1906, will undoubtedly be shared by all lawyers bringing to bear on that Act minds unbiassed by political considerations. To the student and to those who study law purely as a science, this book will

undoubtedly appeal very strongly, and as that circle of readers is a large one, success should encourage the learned author to devote his efforts to the production of perhaps still another treatise on the sister subject of Contracts. Should such a book reach the same standard of excellence as the present one, Mr. Salmond will occupy a position among legal writers of which he might well be proud. The Index and general "get up" of the book are distinctly good.

Second Edition. *The Theory and Practice of the Law of Evidence.* By W. WILLS, M.A., and T. LAWES, M.A., B.C.L. London: Stevens & Sons. 1907.

We are glad to see a second edition of this excellent work, which combines theory and practice to an unusual degree. We do not know any work of equal size which is so likely to be useful to a practitioner, and Mr. Wills's thorough grasp of principle makes his work of special value to students. A good example of the value of the work is to examine the manner in which the difficult subject of *res gestæ* is treated. In general practice, when an advocate can think of no other reason for the admittance of evidence, he tries to get it in as "part of the *res gestæ*." Mr. Wills points out most clearly that to constitute *res gestæ*, the statements, documents or evidence of conduct must form part of the transaction in issue, and if they do not, but are merely narrative references, they are only admissible under special conditions. Several changes have been made in this edition. The passing of the Criminal Evidence Act 1898 has necessitated very important alterations in the chapter dealing with Competency of Witnesses, and a very careful statement is made of the law on this complicated subject. One very special and valuable feature of the book, namely, the Appendix of Public Documents, has been thoroughly revised and very much enlarged, having been expanded to nearly twice its former size, and now covers more than forty pages. This alone renders the book a desirable possession for any practising lawyer.

Second Edition. *The Law Relating to Workmen's Compensation.* By C. M. KNOWLES, LL.B. London: Stevens & Sons. 1907.

Seventh Edition. *The Employers' Liability Act 1880 and the Workmen's Compensation Act 1906.* By A. H. RUEGG, K.C. London: Butterworth & Co. 1907.

Tenth Edition. *The Workmen's Compensation Act 1906.* By W. ADDINGTON WILLIS, LL.B. London: Butterworth & Co. 1907.

If anybody goes wrong in the interpretation of the Workmen's Compensation Act 1906 it will not be for the want of assistance, and if it be true that "in a multitude of counsellors there is safety," the position of an adviser on the Act should be fairly safe.

The three works we are considering are all good ones, though their scope is somewhat different. Mr. Willis achieves the distinction of reaching his tenth edition, and his work quite deserves it. It is clear, careful, and eminently practical. Mr. Knowles's work is also a good one, and we think he is likely to attain his wish which he expresses thus: "My hope has been to produce a book, useful not only to legal practitioners and those who administer the Act, but also to employers of every degree, trade union officials, and all other laymen who may find themselves concerned with the law on the subject, whether as beneficiaries or victims." We suppose "victims" must be another allusion to employers.

Mr. Ruegg's large experience in this branch of law is well known, and his book has a rather more extended scope. As will be seen by the title, his work expressly includes the Employers' Liability Act 1880, and this he deals with thoroughly and fully in over 200 pages in Part I. Part II has reference to the Workmen's Compensation Act 1906, in about 300 pages more, and there are a number of Appendices containing the text of Statutes, Forms, Rules, etc.

As might be expected, the learned Authors are in agreement on most points, but it is curious and instructive to notice how differently difficulties sometimes strike them. Mr. Ruegg does not even allude to the doubt which has sometimes been expressed as to whether domestic servants are within the protection of the Act. Mr. Knowles gives nearly a page to the discussion of the subject, and does not give a decided opinion, although we think he inclines to including them. Mr. Willis decides without hesitation or discussion that they are within the Act. Mr. Willis is of the opinion that, speaking generally, the sum allowed to commercial travellers for travelling expenses would come under the heading of "special expenses" in Schedule I, par. (2), (d), and cannot be taken into account in assessing compensation, but neither of the other Authors refers to this point. One of the most difficult questions raised by the Act is that of "sub-contracting," under sect. 4. This is a very important section, and by no means easy to understand. The important words

are "work undertaken by the principal," and in their interpretation our Authors do not quite agree. Mr. Knowles would, we think, practically incorporate in the section the marginal note *sub-contracting*, and limit the scope of the section to cases where the relationship of contractor and sub-contractor exists. Mr. Willis limits its application "to such work as the principal may fairly be said to undertake the execution of, or to engage in, in the ordinary course of following his trade or business." Mr. Ruegg, who examines the point at greatest length, after some hesitation comes to the conclusion "that the principal is liable, not only where he himself contracts with a third party, but where he sub-contracts for any work which is within the scope of his own trade or business." Mr. Willis does not seem to share the doubts felt by both the other Authors, as to whether an employer who has paid a workman's claim by agreement has a right to indemnity against a third party who has caused the accident. Mr. Ruegg discusses the curious point whether sect. 1 of the Public Authorities Protection Act will prevent any claim for compensation under the Workmen's Compensation Act 1906 being brought against a public authority after six months from the date of the accident. He considers the question an arguable one, but that the Public Authorities Protection Act 1893 does not apply. This point is not raised by Mr. Knowles or Mr. Willis, but the latter is alone in pointing out how the Act will affect Educational Authorities, and also that any person employed by public authorities for casual labour will come under the Act. One of the most difficult questions to answer in the interpretation of the Act will be—What is casual employment? Mr. Willis simply refuses to discuss it. Mr. Knowles says it is a question that can only be decided according to the circumstances of each case, but points out that employment is not necessarily casual because it is intermittent. Mr. Ruegg discusses the question more fully, although he admits "it will necessitate judicial decisions." He makes one observation, which we quote for the benefit of all members of philanthropic societies who are well-advised enough to read our pages:—"If the foregoing view is correct, it follows that all casual labour employed by religious or philanthropic, or quasi-philanthropic, institutions and societies, for purposes entirely religious or philanthropic, is not within the Act; but great care must be taken in every case to see whether, within the main purposes of the society or institution, some work or business is not carried on by the inmates or some of them, or

by casual workmen, for the purposes of direct or indirect pecuniary gain to the society." "Although the profits arising from such trade or business go to augment the funds of the society, it is believed that in such cases neither the employment in which the inmates may be engaged, nor casual employment invoked for such a purpose, is outside the protection of the Act." We would like to call special attention to the excellent Index to Mr. Willis's book.

Second Edition. *Covenants in Restraint of Trade.* By J. B. MATTHEWS and H. M. ADLER, M.A., LL.M. London: Sweet & Maxwell. 1907.

The learned Authors state in their Preface that the decision of the House of Lords in the *Maxim-Nordenfelt Case*, in the year after the issue of the first edition, rendered a second one necessary. We think it did, but as that decision was given in 1894, it will be seen that no undue haste has been shown in bringing out this edition. At any rate, it is welcome now. That decision has enabled the Authors to dispense with a great deal of the examination they before devoted to the respective theories of Sir Edward Fry, Lord Bowen, and Lord Justice Cotton, though, as may be expected, considerable attention is still paid to them. It is interesting to follow the history of the law of Restraint, and notice how in the course of time it developed. The history is divided into four stages:— (1) From the earliest times to 1711, the date of *Mitchel v. Reynolds*; (2) from 1711 to 1837, the date of *Hitchcock v. Coker*; (3) from 1837 to 1894, the date of the *Maxim-Nordenfelt Case*; and (4) from 1894 to the present day. The first chapter is introductory, and describes the different cases and views of the judges down to 1894. The second chapter is entirely devoted to the *Maxim-Nordenfelt Case*, and we call attention to the brief summing-up of the result at the end. In the next chapter, on Consideration, the Authors submit, and support their submission by strong arguments, "that there is no binding authority to the effect that it is necessary that there should be any consideration to support a covenant in restraint of trade when such a covenant is contained in an instrument under seal." In the chapter on Onus of Proof attention is called to the opinions expressed by Vaughan Williams, L.J., in *Underwood v. Barker*, but it is submitted that the law is accurately laid down by Sir Edward Fry in *Rousillon v. Rousillon*. A very useful discussion

is that on divisibility of covenants, and all the cases since *Mitchel v. Reynolds* which bear on the point are referred to and commented on. Among the points which are still doubtful are "whether, if territory outside England proper is included in the restraint, such area is to be taken into account in judging of the reasonableness of the covenant." It has at last become fairly well settled that the whole of the United Kingdom must be considered in these cases, but as regards the Continent there is "a portentous conflict of judicial opinion." After neatly tabulating the opinions of a number of eminent judges, the Authors are courageous enough to express their own opinion, which is "that the extension of the area of restriction to foreign countries is immaterial." The Authors are again compelled to differ from the view of Vaughan Williams, L.J., on the question of "public interest." An interesting and suggestive book concludes with a Digest of Cases, consisting, first, of a collection of words, phrases, etc., which have received a particular construction, and secondly, a table containing a list of cases where Restraint was held valid, and another list of cases where it was held invalid.

Fourth Edition. *The Relationship of Landlord and Tenant.* By EDGAR FOA. London: Stevens & Sons. 1907.

Mr. Foa's work on Landlord and Tenant has achieved quite a solid success among law treatises. This is quite understandable if an analysis is made of his methods. Never resting content, always looking for some new point of view, whether it be of a decision of the Court or whether it be of the Statute law, and when seen, made a note of. Methods such as these always make for successful authorship. So in the present edition we find Mr. Foa not content only to add the new, but also to remould or touch up the old matter. The much-discussed Agricultural Holdings Act, which although not in force has been the cause of so much legal writing, finds a place in the present edition. Mr. Foa's treatment of this Act is sound and masterly. All its novelties are noted and commented on, in fact his treatment of its sections is one of the best we have seen. The Small Holdings and Allotments Act was passed too late to be incorporated in the text, but was inserted separately at the commencement. The scheme of dividing the work into two parts has been preserved. The first part deals with the creation of the relationship of Landlord and Tenant, the second with the determination of that relationship. Each part is again sub-divided into two

books. Book I is taken up with the modes of creation, Book II with the incidents of creation, Book III with the modes of determination; and finally, Book IV concludes with the incidents of determination. This arrangement is sound, and considerably simplifies research. The Index is full and illuminating of the text. Mr. T. C. Hindmarsh* has again done yeoman service in going through the proof sheets and dealing with the questions of Notice to Quit and Ejectment. In conclusion, it would seem that the fourth edition will not only maintain the position this work has acquired, but will continue to instruct that large circle of readers who at present make continuous use of it.

Eighteenth Edition. *Roscoe's Nisi Prius Evidence.* 2 Vols. By MAURICE POWELL, M.A. London: Stevens & Sons. 1907.

We do not know which of our standard text-books enjoys the longest existence, but *Roscoe's Evidence* must be one of the earliest. We see that the first edition was published no less than ninety years ago. It has enjoyed the advantage of continuity of editorship, the present Editor having been connected with its production for no less than thirty-seven years, having become associated in the editorship with Sir John Day so long ago as 1870. *Roscoe on Evidence* holds an unique position. There is no other book that combines the vast amount of information, both of the law and evidence, necessary for *Nisi Prius* practice. The Table of Cases Cited alone takes nearly 130 pages, and probably contains between ten and twelve thousand cases. An instance of the mode of treatment may be gathered from the fact that over fifty pages are devoted to "Stamps," although the subject is modestly prefaced by the observation that "the subject of stamps, though important and useful at *Nisi Prius*, is one that cannot be treated at length in a work of this kind. The following summary only contains the principal heads, and a selection of the most useful decisions on the Acts." As might be expected, there are additions and alterations, and more than a thousand new cases have been inserted. An important addition is the incorporation of the Marine Insurance Act 1906, which covers more than forty pages. The passing of the Trades Disputes Act 1906 has necessitated considerable alteration in the heading of "Action for Conspiracy," as well as additional references under the headings of Nuisance and Seduction. The other most important addition that we have noticed is the Workmen's Compensation Act 1906.

A Digest of Leading Cases on the Regulations for Preventing Collisions at Sea. By D. W. SMITH, M.A. Edinburgh: T. & A. Constable. 1907.—This Digest has an Appendix containing the Regulations of 1897, 1884, 1880, and 1863, together with an Excerpt from a Report of the Trinity House Fog-Signal Committee, 1901, and is intended to bring before Shipowners and Shipmasters the leading cases on the Regulations at present in force, as well as those on previous Regulations so far as they remain of practical interest, to which have been added some cases in the Supreme Court of the United States. In these cases will be found judicial interpretations of various words and phrases occurring in the Regulations which will prove useful to all who take an interest in this branch of Maritime law, seeing that the language in which the Regulations are embodied is capable of different constructions, so much so that even the highest judicial authorities have frequently confessed to difficulties of interpretation which they have encountered. There is a copious Index, and we should think the book will be found most useful to Admiralty practitioners.

Fraillies of the Jury. By H. S. WILCOX. *Foibles of the Bar.* By the same Author. Chicago: The Legal Literature Company.—Mr. H. S. Wilcox of the Chicago Bar has produced two little books which may be read with a considerable amount of amusement, but they seem to us rather exaggerated, and we have a better opinion of the majority of the American Bar than the author seems to have. If the language he puts into the mouth of some of his characters is a fair sample of American forensic eloquence the Courts there must be much more lively than ours.

Third Edition. *The Principles of Mercantile Law.* By J. SLATER. London: Stevens & Haynes. 1907.—This little book is intended, we conclude, for business men and not for lawyers, and its purpose is to make clear to the former the principles of law connected, first, with contracts generally, and then with such contracts and business relations as most concern business men. These are principally partnerships, principal and agent, insurances, shipping and negotiable instruments; and the last part of the work deals with two subjects which we hope most business men will not require much information on, namely, Bankruptcy and Bills of Sale. All these subjects are treated judiciously and clearly, and in language as far as possible “capable of being understood by the non-professional mind.” The clauses of the Marine Insurance Act 1906 are given verbatim, as there have as yet been no decisions on them. There is at the end a useful list of definitions, though, as far as the readers of the book consist of business men, a good many of them will be superfluous, as such readers will not require to be told what a charter-party is. The Appendix contains the Limited Partnership Bill 1906, the Marine Insurance Act 1906, and the Prevention of Corruption Act 1906.

Fourth Edition. *Real Property Law.* By W. H. HASTINGS KELKE, M.A., and A. PARTINGTON. London: Sweet & Maxwell. 1907.—This is an epitome written for the use of students, and intended to be used with some large manual. It adopts every means for catching the attention of students, and aiding them to find what is wanted. It is intended as a framework round which he may arrange such amount of detail as he may acquire. At the end of each chapter, in the present edition, there are tables to give the student a skeleton outline to work upon. The book covers a good deal of ground, is well arranged, and written in a clear style.

CONTEMPORARY FOREIGN LITERATURE.

La Servante Criminelle. By RAYMOND DE RVCKÈRE, Judge of the Brussels Tribunal. Paris: 1908.

It speaks well for the ingenuity of the writer that he has succeeded—from the experience of himself and others—in composing an interesting book of over 450 large quarto pages on *criminalité ancillaire*. This criminality must be regarded as largely due to the servant's environment and opportunities. She is seldom born a criminal, and is in most cases led into crime by a man. But she is essentially, a *criminalöide*, an occasional and not habitual criminal. The term is Lombroso's. Some early legislation on the servant question is given at p. 3, beginning with an edict of Charles V in 1545. A bye-law of Ghent in 1750 classes servants as vagabonds. That is not the writer's view. He goes rather far the other way in suggesting women judges to try women servants (p. 459). Several English crimes of note are described, *e. g.*, that of Elizabeth Canning. In fact, the book provides a good deal of gruesome reading, tending to show that the wickedness of Mary Jane, acquired though it be, may sometimes rise to a height not to be despised by the innate criminal.

Annuaire de la Législation de Travail, X^e Année, 1906. Tables Décennales (1897—1906). Brussels: 1907.

The tenth annual issue of this useful compilation of Comparative law—issued by the *Office du Travail*—is brought down to the end of 1906. Its value is enhanced by a digest of the contents of the ten volumes which have so far appeared. The United States provide some of the most interesting labour legislation. Legislation analogous to our Truck Acts fills a good deal of space. There is the abolition of store money orders in New York (p. 152), and of payment by scrip in Arkansas (p. 596), and Texas (p. 619). The word "boycotting" receives legislative sanction in an Act of Colorado (p. 600), and Belgian jurists translate it by *boycottage*. Denmark has extended its Workmen's Compensation Act to sailors in the navy and in the employment of Government departments (p. 75). Canada has forbidden excursion trains on Sundays (p. 302).

Das parlamentarische Interpellationsrecht. By Dr. HANS L. ROSEGGGER. Leipsic: 1907.

This constitutes Vol. VI, Part 2, of the excellent series of the *Staats-und volkerrechtliche Abhandlungen*, many of the volumes of which have already been noticed in this Magazine since the beginning of the series in 1895. Dr. Rosegger rightly distinguishes the legal from the discretionary powers of the President of any Chamber. Cases must arise which can only be determined by analogy and a sense of equity. The personal equation, the strength or weakness of the President, counts for much. The States separately treated are Germany, Austria, France, and the United Kingdom. In the last chapter the rules current in Russia, Japan, and other States are more briefly treated. The right of interpellation seems not to exist in the United States, that is, in Congress. As to the State legislatures, the author has no information. With regard to the House of Commons, it is interesting to notice that in 1847 there were no more than 129 questions addressed to ministers. Since then the number has steadily increased by almost annual increments, aided since 1902 by the new practice of giving answers in writing. As a sketch of comparative Parliamentary procedure, Dr. Rosegger's careful compilation may be recommended to students of Constitutional law.

PERIODICALS.

Deutsche Juristen-Zeitung. Berlin: 15 July—15 Sept., 1907.

Dr. Ernest Schuster contributes a letter from London, dealing chiefly with the law of contempt of court (p. 1011). Some of the questions dealt with at the *Juristentag*—this year at Freiburg in Breisgau—are suggestive. Among others are arbitration between employers and employed, picketing and boycotting in trade disputes, and the separate valuation of the factory building and the machinery which it contains. Any one interested in the reform of Criminal law might do worse than found, as did the late Professor Berner, a *Reisestipendium* for the purpose of enabling the holder to travel and observe the modes of foreign criminal procedure (p. 946).

La Giustizia Penale. Rome: 28 June—20 Sept., 1907.

This weekly periodical continues to maintain its high character as one of the principal Continental digests and reviews. One amusing case from Taranto, on p. 1049, would almost certainly have been differently decided in this country. The prosecutor and the defendant had a dispute about the ownership of an olive tree. The defendant said to the prosecutor, "I am going to gather the olives from the tree to-morrow; if you are daring enough to be there I will beat your brains out against the tree." The inferior Court found the defendant guilty of threatening language. This sentence was quashed by the Tribunal, in the absence of evidence that the defendant went to the place on the day after the threat.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space:—Pellerin's *French Law of Bankruptcy*; *Encyclopædia of the Laws of England*, Vol. VI; Chambers' *Handbook of Public Meetings*; Ledlie's *Sohn's Institutes of Roman Law*; *The Law of Sales* (Horace Cox); *Fallacies of the Law* (Legal Literature Co., Chicago); Stephens's *Law of Freight*; *Wise on Riots*; Emanuel's *Law of Married Women's Contracts*; Tebb's *A.B.C. County Court Practice*.

Other publications received:—*Proceedings of the American Political Science Association*, Vol. 3; *Transactions of the Medico-Legal Society*, Vol. IV; *Rivista Internazionale* for September; Rushton's *Shakespeare's Legal Maxims* (Hy. Young & Sons).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

THE LAW MAGAZINE AND REVIEW.

No. CCCXLIII.—FEBRUARY, 1907.

I.—THE CONSTITUTIONAL POSITION OF THE HOUSE OF LORDS.

THE House of Peers, or Lords, as it is commonly called, has two aspects or characters. It is at the same time the Upper House of our legislature, and the final court of appeal in all legal matters. Each of these aspects is broadly distinguished from the other by well-known marks, but it is with the former aspect only that we propose to deal in this article. With the House of Lords as a Court of law we have nothing to do, except as lawyers to express our great respect for its decisions as the product of the most highly-trained legal intellects of our time.

The present juncture of public affairs has strongly called attention to the position and functions of the House of Lords. It may not, therefore, be out of place to endeavour to show, from a historical and legal point of view, what is the true position of the House of Lords, and what are its functions and powers regarded as a factor in our system of legislation, so that those who talk about it, without the advantage of a legal training, may know upon what ground they stand. If in so doing we should occasionally stray into the thorny path of politics, and manifest a personal predilection for an unsettled and debateable view, may we claim

the indulgence of our readers, assuring them that it is unintentional?

Early in 1906, after the advent to office of the present Liberal ministry, it was seen that a great change was likely to take place in the relations between the House of Commons and the House of Lords. So far back as February 23rd, 1906, a morning paper,¹ with a large circulation, which keeps its finger well on the pulse of the public, pointed out that:—

“With a substantial Unionist majority in the House of Lords, and an overwhelming preponderance of Liberals in the Commons—the former traditionally antagonistic to the more reactionary measures of the Radical Party—a situation has arisen which will direct more public attention to the proceedings of the peers than for many years past.”

And the Duke of Devonshire, speaking in the House of Lords the day before, touching on this changed condition of affairs, said:—

“In recent years your lordships have had little more to do than to assent to measures sent up from the other House. This system will now be fundamentally altered. It will be for your lordships to consider how far it may be prudent and wise, and how far it may be your duty to exercise your constitutional rights in regard to such measures.”

Later in the year Lord Lansdowne, speaking at Perth (on October 6th) said:—

“He scarcely ever opened a newspaper without seeing most fantastic predictions as to the use to which the House of Lords was going to put its majority. These predictions were usually accompanied by threats of a grotesque character. They were told that the House of Lords would pass under the steam roller, and also that somebody was going to have a game of foot-ball with the House. The House of Lords did not claim to obstruct, but it did claim, and it meant to exercise, the right of revising the measures that came from the Commons.”

And again, Mr. Balfour speaking at Manchester (on October 23rd):—

“Exposed the Liberal party’s plan to get rid of the Lords’ veto; with the irritated constituencies behind them, and with a public opinion, maddened by the obstructive policy of the House of Lords, the Liberals proposed to effect some as yet unspecified change in the character of the House, or its abolition altogether. That, was revolution.”

¹ *The Daily Mail.*

The action of the House of Lords in regard to the lately defunct Education Bill of the Government, intensified the feeling between the two Houses to such a degree that on December 3rd, Mr. Lloyd-George declared at Oxford, that "the road to the throne must be cleared."

What then is the position that the House of Lords now holds? In order to answer this question we cannot do better than refer, by way of introduction, to one of the writings of the late Earl of Beaconsfield, namely, *Coningsby*; or, *The New Generation*, the first edition of which was published in 1844. *Coningsby* is, in form, a novel, but it was characterised by the *North British Review* as "hardly deserving to be called a novel." The same review continues:—

"It contains little of a story, and what there is is ill conceived and carelessly executed. Its attractions are derived from two sources, the supposed reality of the personages, whom the author introduces on his stage, and the political end and scope which the author has in view. Mr. Disraeli (as he then was) merely uses the machinery of a tale as an instrument of personal and political satire."

There are, however, parts of the book that are obviously written in sober earnest, and are intended to convey the deliberate opinions of the author, and it is to these parts of the book that we propose to refer, although it may appear strange to begin a legal disquisition by referring to a novel. But it must be remembered that the novel in question was the work of a great statesman, who had an intimate knowledge of the history and working of our political system. Throughout this book the author repeatedly speaks of the form of Government which existed in England between the year 1688 (when the Glorious Revolution brought over William of Orange and firmly established constitutional kingship) and the year 1832 (when the great Reform Act was passed), as a "Venetian Constitution," which is his way of saying that the government of the country during that period, was in the hands of an oligarchy of nobles, who, sitting in the House of Lords themselves and controlling the House of Commons by means of "pocket boroughs," which

they owned, guarded and guided largely in their own interests the fortunes and destinies of the nation. Originally this oligarchy was composed of Whigs, but after the Peace of Utrecht in 1712, it became Tory.

In 1832, however, by the Reform Act of that year, a great change was wrought in the Constitution. Alluding to a speech of the great Duke of Wellington, in the House of Lords, on the 15th May, 1832 (a speech to which we shall refer again presently), Mr. Disraeli says:¹ "From that moment power passed from the House of Lords to another assembly," viz., the House of Commons. Later on,² he puts into the mouth of his chief character these regretful words: "The Upper House has abdicated its initiatory functions, and now serves only as a court of review of the legislation of the House of Commons." And again³ —

"The House of Lords, even the Monarch himself, has openly announced and confessed within these ten years (it will be remembered that *Coningsby* was published in 1844) that the will of the House of Commons is supreme. A single vote of the House of Commons, in 1832, made the Duke of Wellington declare in the House of Lords, that he was obliged to abandon his Sovereign in "the most difficult and distressing circumstances. *The House of Commons is absolute. It is the State.*"

It may be doubted if Disraeli himself, acute observer as he was, fully appreciated the truth and force of the last words of this passage when he wrote them; and although their truth and force may have become somewhat obscured of late years owing to the wisdom of the Lords in yielding upon all vital questions, and the polite forbearance of the Commons in not insisting on unimportant points, the words are as true and as strong to-day as when they were written. When the Conservative party is in office there is generally complete agreement between the two Houses; it is only when the Liberals are in power that a conflict is likely to occur. Nevertheless in both cases it is a true statement of Constitutional law, which needs no emphasis that "The

¹ *Coningsby*, Bk. I, ch. vii.

² Bk. VII, ch. ii.

³ *Ib.*

House of Commons is absolute. It is the State." We have Disraeli's own words for it.

Another eminent authority on constitutional law and theory, the late Mr. Walter Bagehot, has pointed out the change which took place in the relative positions of the two Houses as the result of the passing of the Reform Act of 1832:—

"From the Reform Act the function of the House of Lords has been altered in English History. Before that Act it was, if not a directing Chamber, at least a Chamber of Directors: The influence of the nobility was then so potent that it was not necessary to exert it."¹

"Since the Reform Act (of 1832) the House of Lords has become a revising and suspending House. It can alter Bills, it can reject Bills on which the House of Commons is not yet thoroughly in earnest—upon which the nation is not yet determined. Their veto is a sort of hypothetical veto."²

The same writer goes so far as to maintain that the House of Lords has always been the inferior chamber.

"If we remember the great reverence which used to be paid to nobility as such, we shall be surprised that the House of Lords, as an assembly, has always been inferior: that it was always, just as now, not the first, but the second of our assemblies.³ As individuals the Peers were the greatest people: as a House, the collected Peers were but the second House."⁴

Let us see what were "the most difficult and distressing circumstances" above alluded to. The present generation, perhaps, is not so well acquainted with the causes which produced and the circumstances that attended the passing of the great Reform Act of 1832 as it ought to be. For some time past it has been the fashion for speakers and writers to scoff at every mention of that Act as matter of ancient history. It has been said, with a good deal of truth, that the only ancient history is that of the Middle Ages, because we know least about it. In like manner the political history of the 19th century does not appear to be so well known as say that of the 17th. Yet the struggle which preceded the passing of the great Reform Act of 1832, the

¹ *The English Constitution*, p. 99. ² *Ib.*, p. 100. ³ *Ib.*, p. 94. ⁴ *Ib.*, p. 94.

actors who took part in that struggle, and the views and principles which they professed and laid down, are well worthy of our attention, since they gave rise to our modern political parties, still form the basis of the essential differences between them, and afford us valuable political lessons which cannot too often be repeated. The change from the harsh names of Whig and Tory to the milder Liberal and Conservative took place soon after 1832.

Of the inequalities, injustice and corruption which brought about the Reform Act of 1832 there is no necessity to speak here. The full account may be read in the earlier chapters of Molesworth's *History of England from 1830 to 1874*.¹ Notwithstanding the fact that in September, 1830, the Duke of Wellington had solemnly declared that the constitution of Parliament needed no reform, in November of that year Earl Grey represented to the House of Lords that Parliamentary reform was part of the ministerial programme; and on 1st March, 1831, Lord John Russell introduced the first Reform Bill into the House of Commons. It was allowed to pass the First Reading without opposition, but passed the Second by a majority of only one. The King (William IV) thereupon dissolved Parliament. Upon its re-election, the House of Commons contained a large majority in favour of reform under the leadership of Earl Grey. A second Bill was introduced, and passed the Second Reading in the House of Commons by a majority of 136 (367 to 231), and the Third Reading by a majority of 106 (345 to 239); but it was rejected in the House of Lords on the 8th October, 1831, by a majority of 41 (199 to 158). In consequence of this rejection there was an outburst of popular indignation and violence such as had never been seen in England since the great Civil War between Charles I and the Parliament. A third Bill was presented to the House of Commons in

¹ See also Mr. Stanley Weyman's latest book—*Chippings*—for a vivid account of the state of society about 1830, and the passing of the Reform Act. Its appearance is very opportune.

December, 1831, and passed the Second Reading, the critical point in the passing of a Bill, by a majority of 162. Intimidated by largeness of this majority and the temper of the people, the House of Lords also passed the Second Reading, by a majority of nine (184 to 175); but, led by Lord Lyndhurst, the Tory Peers endeavoured in Committee so to mutilate it, that the chief objects of the Bill would have been defeated. Earl Grey and his colleagues in the ministry demanded a creation of new peers, which the King refused, and thereupon they resigned. The feeling of the people against the House of Lords once more burst forth, and showed itself in the form of a profound commotion, even more serious than that of a few months before. Nottingham Castle was set on fire, and at Bristol there was a riot, accompanied by great destruction of property. In nearly every part of the country there was agitation, followed by scenes of disorder. The Tory Peers were insulted when they appeared in public, and it was impossible to prevail on juries to find verdicts against the authors of the violent and abusive political diatribes which were issued from day to day. The Bishops were an especial object of aversion, because it was thought that they, by reason of their sacred office, ought to have been in favour of reform, and that, if they had been, the Bill would have passed, as no doubt it would. The number of crimes committed in various parts of the country in consequence of the action of the Lords was estimated by Earl Grey at no less than nine thousand. On the 9th May, 1832, the King sent for Lord Lyndhurst, who had previously been Lord Chancellor during the Tory administrations of Canning, Goderich, and the Duke of Wellington. He and the Duke endeavoured to form a ministry, but their efforts proved abortive, owing partly, it is said, to the refusal of Sir Robert Peel to join them in any measure of reform however moderate.

Let us tell what took place in the words of Mr. Disraeli:—

"It was on the 9th May (1832) that Lord Lyndhurst was with the King, and on the 15th all was over. Nothing in Parliamentary history is so humiliating as the funeral oration delivered that day by the Duke of Wellington over the old Constitution that, modelled on the Venetian, had governed England since the accession of the House of Hanover. He described his Sovereign, when his Grace first repaired to his Majesty, as in a state of the greatest 'difficulty and distress'; appealing to his never-failing loyalty to extricate him from his trouble and vexation. The Duke of Wellington, representing the House of Lords, sympathises with the King, and pledges the utmost efforts for his Majesty's relief. But after five days' exertion, this man of indomitable will and invincible fortunes resigns the task in discomfiture and despair, and alleges, as the only and sufficient reason of his utter and hopeless defeat, that the House of Commons had come to a vote which ran counter to the contemplated exercise of the prerogative. . . . *From that moment power passed from the House of Lords to another Assembly.* . . . In less than a fortnight's time the House of Lords, like James II, having abdicated their functions by absence, the Reform Bill passed."¹

On the 7th June, 1832, the Lords, who had previously opposed the passing of the bill, with the exception of a few stern and unbending Tories, whom even the King could not prevail upon, withdrew their opposition and allowed it to become law, by 106 to 22 votes. Thus closed the struggle for the Great Reform Act of 1832, one of the most momentous and memorable struggles in our national history.

We are not here concerned with the provisions and details of the Reform Act, nor with the wisdom or unwisdom of the reformed House of Commons. What we are concerned to know is, by what means was this extraordinary change in the attitude of the Tory Peers brought about; how were they prevailed upon to withdraw their opposition to the Reform Bill and allow it to pass? On the failure of Lord Lyndhurst and the Duke of Wellington to form a Ministry, Earl Grey and his colleagues had been recalled by the King, but the Lords still remained hostile to the measure. Whence, then, this change? How was their opposition overcome? Simply by the knowledge that the King, at the request of Earl Grey, had consented, if necessary, to exercise an undoubted prerogative of the Crown, and create a sufficient number of

¹ *Coningsby*, Bk. I, ch. vii.

new peers to ensure a majority which would carry the bill as it was sent up by the Commons, without emasculation; and rather than have their number augmented to such an extent, the Tory peers gave way. The exact terms of the King's consent were as follows:¹—

“The King grants permission to Earl Grey, and to his Chancellor Lord Brougham, to create such a number of Peers as will be sufficient to ensure the passing of the Reform Bill—first calling peers' eldest sons.”

“William R.”

“Windsor, May 17, 1832.”

The proposed creation of new peers was not, however, carried out. The King, following a precedent set by George III, in 1783, privately intimated to the Duke of Wellington, through his Secretary (Sir Herbert Taylor) that the matter might be settled by a “declaration in the House of Peers to-night from a sufficient number of Peers, that in consequence of the present state of affairs they have come to the resolution of dropping their opposition to the Reform Bill”; and such a declaration was made. It was not without reluctance, when it came to the point, that the King gave this permission to Earl Grey and Lord Brougham; and he declined to give his personal assent to the bill, although only a few months before he had expressed his readiness to go down to Parliament in a hackney coach, if necessary, to assist the progress of the measure. Probably the manner in which the permission was extorted from him had something to do with his reluctance, but both he and the Duke of Wellington knew well that the country was on the verge of a revolution, and that nothing else could avert the greatest of all national calamities—a civil war. There can be little doubt that the knowledge that such permission had actually been given had much greater weight with the Tory peers than the King's persuasion. “The power was not used, but its existence was as useful as its energy.”²

¹ See Roebuck's *History of the Whig Ministry*, Vol. II, p. 331. Also Molesworth's *History of England*, Vol. I, ch. iv, p. 222.

² Bagehot, p. 99

The prerogative of creating new peers above mentioned is an ancient and undoubted right of the Crown, to whom, and to whom alone, it belongs. It might be exercised at the mere caprice of the King or Queen for the time being, but in practice it is now generally exercised on the advice of the Prime Minister. When employed for the purpose of overcoming the opposition of a majority of the House of Lords, it has been well styled the "safety valve" of the constitution.¹ It has been so employed on one occasion, though curiously enough it was then employed against the Whig party. In 1712 Queen Anne, on the advice of a Tory Ministry, created twelve new peers in order to carry the Peace of Utrecht, which was opposed in the House of Lords by a Whig majority led by the Duke of Marlborough.

"The excitement caused by this exercise of the prerogative does not seem to have extended much beyond the limits of Society, nor to have met with much more severe comment than the jest of (Lord) Wharton, who asked the twelve new peers, as they were about to take part in a division, immediately after taking their seats, 'whether they intended to vote singly or by their foreman.'"²

The point of this sarcasm is obvious.

The addition of twelve new members to the House of Lords does not now appear to be a very large one (indeed, the present Liberal Government has added fifteen since they came into office), but at that time, in 1712, the number of members of that House, if we exclude the sixteen Scottish Representative Peers, who had been added by the Act of Union with Scotland in 1707, was only 168, considerably less than one-third of what it is now. In 1719, and again in 1720, attempts were made to fasten down this "safety valve," but fortunately, for the good of the country, they proved unsuccessful. With the sanction of George I, certain bills known as Sunderland's Peerage Bills were introduced into the House of Lords in those years, for the purpose of limiting this prerogative of creating Peers; and the Lords,

¹ Bagehot, *Eng. Const.*, 229.

² Anson, *Law and Custom of the Constitution*. 1st Ed., Vol. I, p. 297.

bearing in mind the result of the action of the Crown in 1712, readily fell in with the scheme. But the foresight and sagacity of Sir Robert Walpole and the other Whig Leaders in the House of Commons were too great for them to be caught napping in this way. In spite of the fact that it had been used against themselves in 1712, they recognised in this "safety-valve" an invaluable means of controlling the Upper House, and therefore they gave the scheme their strongest opposition. Accordingly the Bill was finally rejected in the House of Commons by a large majority (269 to 177).¹ "Its passing," says Mr. Taswell-Langmead, "would have transformed the House of Lords into a close, aristocratic body, independent alike of the Crown and the people."² And it is highly probable that if this power had not been in existence in 1832, the country would have suffered the horrors of a civil war.

The threat of creation of new Peers in 1832 was loudly denounced by the Tory party as an "unconstitutional exercise of the prerogative," meaning thereby nothing more than that in their view it was improper and unfair to them, although they themselves had not scrupled to make use of it in 1712. This denunciation was admirably answered by Earl Grey in a speech delivered by him in the House of Lords on May 17th, 1832:—

"I ask, what would be the consequences, if we were to suppose that such a prerogative did not exist, or could not be constitutionally exercised? The Commons have a control over the power of the Crown, by the privilege, in extreme cases, of refusing the supplies; and the Crown has, by means of its power to dissolve the House of Commons, a control upon any violent and rash proceedings on the part of the Commons; but if the majority of this House is to have the power whenever they please of opposing the declared and decided wishes both of the Crown and the people, without any means of modifying that power—then this country is placed entirely under the influence of an uncontrolled oligarchy. I say that if a majority of this House should have the power of acting adversely to the Crown and the Commons, and was determined to exercise that power, without being liable to check or control, the Constitution is completely

¹ See Lord Mahon's *Hist. of Eng.*, Vol. I, pp. 530—546.

² *Eng. Const. Hist.*, p. 712.

altered, and the Government of this country is not a limited monarchy ; it is no longer, my Lords, the Crown, the Lords and the Commons, but a House of Lords—a separate oligarchy—governing absolutely the others.”¹

The theoretical position and functions of the House of Lords since 1832 have been described from their own point of view by two prominent Conservative politicians and statesmen. Speaking against the second reading of the Corn Importation Bill, in 1846, the great Earl Derby, the “Rupert of debate,” said :—

“My Lords, if I know anything of the Constitutional importance of this House, it is to impose a salutary obstacle to rash and inconsiderate legislation ; it is to protect the people from the consequences of their own imprudence. It has never been the course of this House to resist a continued and deliberately expressed public opinion. Your Lordships have always bowed, and always will bow, to the expression of such an opinion ; but it is yours to check hasty legislation leading to irreparable evils.”²

And speaking on the second reading of the Oaths Bill, in 1858, the venerable Lord Lyndhurst said :—

“It is part of our duty to originate legislation ; but it is also a most important part of our duty to check the inconsiderate, rash, hasty, and undigested legislation of the other House ; to give time for consideration, and for consulting or perhaps modifying, the opinions of the constituencies ; but I never understood, nor could such a principle be acted upon, that we were to make a firm, determined, persevering stand against the opinion of the other House of Parliament, when that opinion is backed by the opinion of the people ; and least of all on questions affecting, in a certain degree, the constitution of that House and popular rights. If we do make such a stand, we ought to take care that we stand on a rock.”³

Assuming that the two speeches quoted above contain a correct statement of the present theoretical position and functions of the House of Lords, the practical question remains, when should the House of Lords give way to the Commons ? This question was answered by Mr. Bagehot, writing in 1872, as follows :—

“I conceive, therefore, that the great power of the House of Lords should be exercised very timidly and very cautiously. For the sake of keeping the headship of the plutocracy, and through that of the nation, they should not offend the plutocracy ; the points upon which they have to yield are mostly very minor ones

¹ *Hansard's Deb.*, xii, 1006.

² *Ib.*, lxxxvi, 1175.

³ *Ib.*, ii, 1768.

and they should yield many great points rather than risk the bottom of their power. They should give large donations out of income, if by so doing they keep, as they would keep, their capital intact."¹

And writing in 1886, Professor Dicey gives the following answer :—

"The general rule that the House of Lords must in matters of legislation ultimately give way to the House of Commons is one of the best established maxims of modern constitutional ethics. •But if any inquirer asks how the point at which the Peers are to give way is to be determined, no answer, which even approximates to the truth, can be given, except the very vague reply that the Upper House must give way whenever it is clearly proved that the will of the House of Commons represents the deliberate will of the nation. The nature of the proof differs under different circumstances." . . . "It is also certain that while the Peers have been forced to pass many bills which they disliked, they have often exercised large though very varying control over the course of legislation. Between 1834 and 1840 the Upper House, under the guidance of Lord Lyndhurst, repeatedly and with success opposed ministerial measures which had passed the House of Commons. . . . On any matter upon which the electors are firmly resolved, a Premier, who is in effect the representative of the House of Commons, has the means of coercion, namely, by the creation of Peers. In a country indeed like England, things are rarely carried to this extreme length. The knowledge that a power can be exercised prevents its being actually put in force."²

Such is the theory, but in practice we have seen that, on the only occasion in the last century, when it was necessary to have recourse to this expedient, the Peers did not give way until the country was brought to the very verge of revolution and civil war. This observation draws attention to the great difference there is between the theoretical view and the practical working of our Constitution, which has been well expressed by Mr. Bagehot :—

"When we cease to look at the House of Lords under its dignified aspect, and come to regard it under its strictly useful aspect, we find the literary theory of the English Constitution wholly wrong, as usual. This theory says that the House of Lords is a co-ordinate estate of the realm, of equal rank with the House of Commons ; that it is the aristocratic branch, just as the Commons is the popular branch ; and that by the principle of our constitution the aristocratic branch has equal authority with the popular branch. So utterly false is this doctrine that it is a remarkable peculiarity, a capital excellence of the British Constitution, *that it contains a sort of Upper House which is not of equal authority to the Lower House, yet still has some authority.*"³

¹ *Eng. Const.*, Introd. to 2nd Ed., p. xxiv.

² *The Law of the Constitution*, 2nd Ed., pp. 387-8.

³ *Eng. Constitution*, p. 97.

Professor Dicey has also pointed out the difference between (1) the lawyer's view of the Constitution, with its unreality; (2) the historian's view of the Constitution, with its antiquarianism; and (3) the view of political theorists, whose defect it is that they deal solely with the conventions of the Constitution. It is necessary in dealing with the British Constitution to guard against these errors, and to notice that, in the practical working of the Constitution, there is a flexibility which arises from the fact that it is not, like the Constitutions of the United States of America and of France, a written Constitution. Each case must be dealt with upon its own merits as it arises, due regard being had to the precedent (if any) afforded by similar previous cases.

From the foregoing it will be seen that there have been three periods in the political history of England:

I.—Prior to 1688. This period may be called the era of personal rule by the Crown, assisted by its Ministers, and to some extent, checked and controlled by the two Houses of Parliament. James II, undeterred by the fate of his father, Charles I, attempted to alter the laws and religion of his subjects without their consent; with the result that he had to fly from the country and abdicate his throne.

II.—From 1688 to 1832. William III was brought over from Holland, and by his wise acceptance of the Bill of Rights, once and for all established a constitutional or limited monarchy in this Kingdom. He was brought over by Whig nobles, who at that time were in a majority in the House of Lords. Hence it is not surprising that the power which was taken away from the Crown passed into the hands of the House of Lords, and remained there till 1832.

III.—From 1832 to the present time. As the result of the Reform Act of 1832, this paramount power was trans-

ferred from the House of Lords to the House of Commons, where it still remains. Thus we see how the political centre of gravity in the English Constitution has shifted, how the basis of power has been altered. "The House of Commons is absolute," said Mr. Disraeli, "It is the State." It is in fact the "predominant partner" in the Constitution. "The Upper House has abdicated its initiatory functions and now serves only as a Court of review of the legislation of the House of Commons." This statement, however, is not quite correct, as will appear presently, since it is still possible, with certain exceptions, for bills to originate in the House of Lords.

As regards the "checks and balances" of the Constitution, that is to say, the powers of control which each of the three factors, viz., the Crown and the two Houses of Legislature, has over the others, they appear to be these:—

(1) The Crown controls the House of Lords by its prerogative of creating new Peers, and controls the House of Commons by its right of dissolution. "The functions of our executive in dissolving the Commons and augmenting the Peers, are among the most important, and the least appreciated, parts of our whole government."¹ Each of these prerogatives is now exercised by the Crown on the advice of the Prime Minister, who is the head of the Cabinet, a body unknown to our law. But that is another chapter in our political and constitutional history.

(2) The House of Lords exists principally, though not entirely, as a Court of Review. This aspect of the matter has already been dealt with above.

(3) The House of Commons, by its power to grant or withhold supplies, exercises control over both the Crown and the House of Lords. This is, indeed, the vital part and power of the Constitution. In public as in private life the party who holds the purse strings is master of the situation.

¹ Bagehot, *Eng. Const.*, p. 220.

That the House of Lords occupies a subordinate position with regard to the House of Commons, is shown by the fact that while the House of Commons controls the House of Lords by means of its privileges in regard to money matters, the House of Lords possesses no similar means, or any means whatever, of controlling the House of Commons.

“As a general rule, bills may originate in either House, but the exclusive right of the House of Commons to grant supplies, and to impose and appropriate all charges upon the people, renders it necessary to introduce by far the greater proportion of bills into that House.”¹

Of late years, however, there has been a distinct tendency on the part of the Upper House to re-assert itself. By the Conservatives this is ascribed to the danger of Home Rule for Ireland (from which they declare the House of Lords has saved us), and the general socialistic tendency of modern legislation. The Liberals, on the other hand, ascribe it to the growing power and influence of Conservatism in that House, which they say is inevitable in any House based on the hereditary principle. Certainly it does seem strange that only about ninety peers out of six hundred (about fifteen per cent.) now profess Liberal views. It does seem as though the House of Lords was the lethal chamber of Liberalism, *since a great number of these Peers when created were Liberals*. The Liberals further say that the fact that there is in the House of Lords a huge, overwhelming, majority of Conservatives which constitutes a permanent opposition to the Liberals when in office, and forms a valuable and powerful ally on all occasions to the Conservatives, when in office or out of office, is a serious obstacle to Liberal legislation, and prevents any Liberal measure receiving fair consideration. This tendency to re-assert itself has been called “The Renaissance of the House of Lords,” and, curiously enough, it has shown itself during the past year in a way that was little expected.

¹ Erskine May, *Parliam. Practice*, 10th Ed., p. 434.

Returning to the question of the granting and withholding of supplies, which belongs entirely to the House of Commons, it might have been thought that this important question, the most important of all political questions, had long ago been definitely settled. As the result of a long struggle between the Crown and the people, it was settled by two Acts of the Long Parliament (16 Charles I, ch. 8 and ch. 14), that the Crown could not impose arbitrary taxation without the consent of Parliament, and since then the right of the Commons to control all money questions has been undoubted. As regards the Crown and taxation, says Sir Erskine May, "the Bill of Rights crowned the final triumph of the Commons over prerogative."¹ As regards the House of Lords, so far back as 1407 (9 Henry IV) the Commons asserted their right that all Money Bills must *originate* in their House; and this event is noteworthy as being the first instance of a collision between the two Houses. The right was again asserted in 1593 and settled in the Short Parliament of 1640.

But besides claiming the exclusive right of initiating Money Bills, the Commons always maintained that such bills should not even be *amended* by the Lords, and in 1671 they successfully disputed the right of the Lords to amend a Money Bill; since that year their contention has been tacitly acquiesced in by the Lords. The Lords, however, still claimed that they had the right to reject a Money Bill, "to pass all or reject all, without diminution or alteration," and on two occasions, in 1671 and 1689, it must be admitted that the Commons recognised this right of the Lords. In 1860, even this right of rejection was taken away from the House of Lords. That House in that year rejected a Bill for the repeal of the Paper Duties, which had been carried in the House of Commons by a majority of only nine. Its legal right to reject any bill

¹ *Const. Hist.*, ii, 99.

whatever was indisputable, but it was contended by the House of Commons, says Sir Erskine May, that for the Lords to revive a right which they had not exercised for nearly two hundred years, "was a breach of constitutional usage, and a violation of the first principles upon which the privileges of the House were founded. If the letter of the law was with the Lords, its spirit was clearly with the Commons." Lord Palmerston thereupon proposed three resolutions¹ in the House of Commons, which were passed by that House and were shortly as follows: (1) "That the right of granting aids and supplies to the Crown is in the Commons alone." (2) "That the exercise of the power of rejection by the Lords, has not been frequent, and is justly regarded by this House with peculiar jealousy, as affecting the right of the Commons to grant supplies and to provide the ways and means for the service of the year;" and (3) "That this House has in its own hands the power so to impose and remit taxes, and to frame Bills of Supply that the right of the Commons as to the matter, measure and time, may be retained inviolate." The struggle was closed the following Session by Mr. Gladstone, who was then Chancellor of the Exchequer, including the repeal of the Paper Duty in a general financial measure, which the Lords were bound to accept. In this way any interference on the part of the Lords was effectually prevented.

Sir Erskine May sums up the matter thus:—

"The concurrence of the Peers and the Crown is only necessary to clothe it with the form of a law. The gift and grant is that of the Commons alone."²

As to the imposition of rates and taxes, the present state of the law is, stated by the same eminent authority upon Constitutional law and usage, as follows:—

"The Lords may not amend the provisions in bills which they receive from the Commons dealing with the above-mentioned subjects, so as to alter, whether by increase or reduction, the amount of a rate or charge, its duration, mode

¹ See Molesworth's *Hist. of England* (1830—74), iii, 167.

² *Const. Hist.*, ii, 104.

of assessment, levy, collection, appropriation or management ; or the persons who pay, receive, manage, or control it ; or the limits within which it is leviable.”¹

However, on the 30th July last, the House of Lords, in considering the Irish Labourers Bill, struck out clause 11, sub-sect. 9, which provided that, in determining the amount of compensation payable to any person, an arbitrator should not make any additional allowance in respect of the purchase being compulsory (a provision which had been carried in the Commons by a majority of 196, viz., 221—25), and inserted a provision that the landowner compelled to sell should be entitled to a premium of ten per cent. This was clearly beyond their powers ; and accordingly, when the matter was reconsidered in the House of Commons, on August 1st, the Speaker at once pronounced it beyond the competence of the Lords. On August 2nd the House of Lords restored the sub-section, when Lord Lansdowne made a short speech by way of a *caveat* or apology.

The composition of the House of Lords throws considerable light on its character. It consists roundly of 600 Members made up as follows :—

Princes of the Blood Royal	-	-	3
Lords of Appeal in Ordinary	-	-	4
Archbishops and Bishops	-	-	26
Scottish Representative Peers	-	-	16
Irish	-	-	28
Peers of the United Kingdom (say)	-		523
			<hr/> 600 <hr/>

It is impossible to give the number with perfect accuracy, because it varies constantly owing to deaths, extinctions and new creations. There are, as a rule, about a dozen minors, who take their seats on attaining full age.

The Lords of Appeal in Ordinary are appointed under the Appellate Jurisdiction Act of 1876, in order to strengthen

¹ May, *Parliam. Practice*, 10th Ed., p. 542.

the House of Lords as a Court of Appeal. They receive salaries of £6,000 a year, and enjoy the dignity of Barons for life. They are the only true life Peers. To this extent, and to this extent only, the House of Lords has given way against its decision, in the *Wensleydale Peerage Case*, mentioned below.

The Archbishops and Bishops are supposed to represent religion in general and the Church of England in particular. The two Archbishops (of Canterbury and York) always have seats: so have the Bishops of London, Winchester and Durham; the remaining 21 seats are filled by the Bishops (of whom there now about are 40) in order of seniority. The Bishops are not, strictly speaking, peers at all, but Lords of Parliament. It is a somewhat unsettled question in what right they sit in the House of Lords, since Convocation is the proper home of the Lords Spiritual, who form one of the estates of the realm; but the better opinion is that they hold their seats simply by virtue of long-continued custom, which has crystallised even the number of seats.

The Scottish Representative Peers were added by the Act of Union with Scotland in 1707. Their admission was at first vigorously opposed by the English Peers. They are elected at the beginning of each Parliament. The Irish Representative Peers were added by the Act of Union with Ireland in 1801; they are elected for life. Both these two classes represent very narrow constituencies, namely, their own order. The Act of Union with Ireland provided that the number of Irish Peers should never sink below one hundred!

The Peers of the United Kingdom sit by virtue of hereditary right. They have been from time to time immemorial the hereditary councillors of the Crown, and in fact sprang out of the *magnum* or *commune concilium* of the nation. From this it will be seen that the vast bulk of the members of the House of Lords sit by hereditary right, although the

principle of life peerages has been conceded to a very small extent, and although the principle of representation, in a very limited form, is to be found in the case of the Scottish and Irish Representative Peers.

It is generally assumed that the coming Session will witness a struggle between the two Houses, arising out of the recent virtual rejection by the Lords of the Government's Education Bill. There is also a strong feeling in the ranks of the Liberal Party, that the time is ripe for a reform of the House of Lords. As it exists, it is the only unreformed part of our Constitution. While the Crown has been reduced from an absolute to a limited monarchy, and while the House of Commons has been three times reformed in the last century (in 1832, 1867 and 1884), if we except the addition of the Scottish and Irish Representative Peers, and the large increase in the number of Peers since 1688, the House of Lords remains substantially what it has been for the last three hundred years. The more violent spirits of the Liberal Party are so incensed that a cry has been raised not to mend it but to end it. The more moderate section of the party, while strongly opposed to the hereditary principle as a mode of selecting legislators, are in favour of a second chamber. We have no intention of digressing further into politics, and we fully admit that even the above-mentioned matters are debateable; but in view of any such struggle and attempt at reform perhaps we may be permitted to point out some of the practical difficulties in the way from a legal point of view, and one at least of the paths which it may be found possible to pursue. Personally, we wish that the Liberal Party would deal with the question of the reform of the House of Lords in a broad, statesman-like and philosophical way, treating it as a substantive measure on its merits, and not as a political expedient, in a moment of temporary irritation due to the rejection of some Liberal measure.

First.—As to the exercise of the prerogative of creating new peers. A certain eminent nonconformist divine is reported to have urged recently, in a public meeting, that the Crown should create five hundred new peers in order to carry a new Education Bill on the lines of the old one. It is submitted that such a proceeding is altogether outside the range of practical politics in the circumstances. If only half that number would be sufficient for the purpose, it is inconceivable that we should have a House consisting of eight hundred and fifty Peers; still more so, of eleven hundred.

Instead of being increased the number of members of that House ought to be reduced by half. The growth of the numbers of the House of Lords is a very interesting subject, but we cannot enter upon it here. Suffice to say that it consisted of only 150 members in the reign of William III; it has now grown to six hundred.

“At the end of George the Third’s reign, the number of hereditary peers had become double what it was at his accession. The whole character of the House of Lords was changed—up to this time it had been a small assembly of great nobles bound together by family and party ties into a distinct power in the State. From this time it became the stronghold of property, the representative of the great estates and great fortunes which the vast increase of English wealth was building up. For the first time, too, in our history it became the distinctive Conservative element in our Constitution.”¹

Of these six hundred only about ninety are known to be Liberals, giving the Conservatives a majority on a division, if every peer voted, of 420. As a rule, however, not more than about 100 peers attend the House regularly. Even in the recent exciting debates on the Education Bill, only about half the House attended. The numbers in the most important divisions were about 250 Conservatives to 50 Liberals.

“A severe, though not unfriendly critic of our institutions, said that ‘the cure for admiring the House of Lords was to go and look at it.’—to look at it not on a great party field day, or at a time of parade, but in the ordinary transaction of business. There are, perhaps, ten peers in the House, possibly only six, three is the quorum² for transacting business.”³

¹ Green, *Short Hist. of Eng. People*, p. 816.

² In the House of Commons the quorum is forty. ³ Bagehot, *Eng. Const.*, p. 113.

It is, however, only fair to say that the number three as a quorum was probably fixed out of regard to its sitting as a Court of law. The late Mr. John Bright used to jest at the aspect of the "whole House."

About forty years ago Mr. Bagehot was of opinion that the House of Lords would die a natural death of sheer atrophy and anæmia; its apathy was then so great. But this was before its "renaissance."

It is even rumoured that some of those who habitually stay away would be glad to be altogether relieved of the duty and responsibility of attending. Still, if the existence of their order were threatened, it is more than possible that nearly all the Peers would turn up to vote; in which case it would be necessary to create between four and five hundred peers in order to ensure a majority. Such a wholesale creation of peers is inconceivable. It will be remembered that on the only occasion on which it was necessary to have recourse to this prerogative, there were only twelve new creations. Had it been necessary in 1832, in all probability about fifty creations would have sufficed. This means of reducing the peers to submission may, therefore, be dismissed as now impracticable, by reason of the increased number of members and the changed state of parties within the House. It could never have been of much use except when the two parties were fairly evenly balanced.

Secondly.—People who talk lightly about the reform of the House of Lords as a thing easy of accomplishment, do not always properly estimate the difficulty of dealing with the matter when it comes to a question of procedure. According to our constitution no Bill can become an Act, *i.e.* can pass into law, until it has passed through both Houses of Parliament and received the assent of the Crown. Suppose the House of Lords refuses to be reformed? Suppose it refuses to submit to a "self-denying ordinance" and perform the "Happy Despatch"? Suppose the Peers say, "We will

not cut ourselves down from fee simples to life estates," what are you to do? Will you proceed by way of mere resolution, as the Long Parliament did, and declare that the House of Peers is "useless and dangerous and ought to be abolished"? And if so, how will you give practical effect to your resolution? Will the Peers turn passive resisters, or will they fight to maintain their dignity, powers and privileges? And if you decide to proceed in the ordinary way by Bill, into which House will the Bill be introduced? Parliament, we are told, is omnipotent; but the Peers are themselves part of Parliament. If their consent can be obtained, it would certainly be better to proceed by Bill. An eminent authority declares:—

"When institutions are founded upon ancient usage, it is a safe and wholesome doctrine that they shall not be changed *unless by the supreme legislative authority of Parliament.*"¹

And this applies to the House of Lords as well as to any other part of the constitution.

The same learned authority states:—

"A Bill which concerns the privileges or proceedings of either House, should, *in courtesy*, commence in that House to which it relates. But Bills affecting privileges of the other House, have, nevertheless, been admitted without objection. Amendments, however, concerning the privileges and jurisdiction of the Lords, have given rise to discussion in both Houses."²

In the ordinary course, therefore, a Bill for the reform of the House of Lords ought to originate in that House; and small as is the Liberal minority there, there would be no difficulty about that; but we suppose that in case of a "Revolution" there would be little room for courtesy. Whether the Bill originated in the House of Lords or not, it would, however, have very little chance of passing in that House without the application of some form of strong external pressure.

The House of Lords, as we have said, is the only

¹ Erskine May, *Const. Hist.*, 9th Ed., Ch. v, p. 298.

² *Parliam. Practice*, 10th Ed., p. 435.

unreformed part of our constitution. In 1858 the Crown proposed to create life peers, but in the celebrated *Wensleydale Peerage Case* it was held that the Crown had no such power. Such a reform would have been of very great value. Writing about thirty-five years ago, Mr. Bagehot said:—

“The House of Lords rejected the inestimable, the unprecedented opportunity of being tacitly reformed. Such a chance does not come twice. The life peers who would have been then introduced would have been among the first men in the country. Lord Macaulay was to have been among the first; Lord Wensleydale—the most learned and not the least logical of our lawyers—to be the very first. Thirty or forty such men, added judiciously and sparingly as the years went on, would have given to the House of Lords the very element which, as a criticising Chamber, it needs so much.”¹

It would have done more than this; as the older peerages became extinct, and no more hereditary Peers were created, the House would have been silently and peacefully converted into an assembly of life members. It remains to be seen whether the present House of Lords will have another similar opportunity of gracefully yielding, or whether something in the nature of a legal revolution will be necessary before that House is brought in harmony with modern political thought and tendency.

In the *Wensleydale Peerage Case* it was urged with great force that—

“By constitutional usage, having the force of law, the House of Lords had been for centuries the hereditary councillors of the Crown, while the House of Commons had been elected by the suffrages of legally qualified electors.”²

In that case “the Crown was forced to submit to the decision of the Lords,”³ a decision in which all the Law Lords and even the legal officers of the Crown agreed. So that the position of the Peers, from a strictly legal point of view, is a strong one. Law, however, deals only with what is; politics with what ought to be, and probably will be. Every change in our Constitution is, in a sense, unconstitutional; but that does not prevent its coming to pass.

An important reform in practice was effected in 1868 by the discontinuance of the custom of voting by proxies.

¹ *Eng. Const.*, p. 124. ² *Erskine May, Const. Hist.*, 9th Ed., ch. v. ³ *Id.*

Thirdly.—There remains only the privilege of the House of Commons as to Money Bills. It may be presumed that a Cabinet which includes such distinguished lawyers and historians as Mr. Bryce, Mr. Asquith, Mr. Haldane, and Mr. Birrell, in addition to the Lord Chancellor and the Law Officers of the Crown, will not be at a loss to devise constitutional expedients necessary and suitable for the purpose when the time comes. But we shall not be surprised if the expedient which is adopted has a close connection with the privilege last mentioned, namely, Money Bills; remembering that a precedent is to be found for such a course of action in the way Mr. Gladstone effected the repeal of the Paper Duties. This is the whip that the Commons always hold *in terrorem* over the Lords; but when driving a spirited horse it is not always advisable to shake the whip; it is enough to hold it in readiness for use if required. No doubt, whenever the matter is brought to an issue, there will be such a storm in the country as this generation has never before witnessed. The House of Lords still possesses great power and influence, more so, perhaps, than its opponents give it credit for; it appeals to the traditions and history of the English nation, as well as to that love of display which is common to human nature. There will be a good deal of talk about “revolution,” but we believe very little blood will be shed in defence of the House of Lords. The “revolution,” such as it will be, will be a legal, rather than a military one. Whatever form it takes, and whatever heat may be generated in the dispute, sincere patriots will fervently re-echo the noble language of the *Prayer for the High Court of Parliament*, “that all things may be so ordered and settled by their endeavours, upon the best and surest foundations, that peace and happiness, truth and justice, religion and piety, may be established among us for all generations.”

G. GLOVER ALEXANDER.

II.—THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS.

THE weaving of the network of international agreements for the reference of disputes to arbitration has made so rapid a progress that the problems of international arbitration have ceased to be connected with the acceptance of the principle of agreements to arbitrate, and have entered the region of the practical application of arbitration clauses. The two main questions appear to be, first, the enforcement of the obligation to submit to arbitration, and secondly, the enforcement of arbitral awards.

The growth in the acceptance of the principle of international arbitration is due to several causes, some of which at first sight appear to be inconsistent. The sentiment of nationality which crystallised during the last fifty years of the 19th century was one factor in its advance. Side by side with the growth of the sentiment of nationality came of necessity the creation and expansion of international understandings both for non-political and for political purposes. In other words, there was a coincidence of the trend towards the creation of national entities which led to the raising of definite issues and the trend towards international co-operation which created paths for their settlement. Nationality is so opposed to the urgency of modern scientific means of communication—postal, telegraphic, telephonic, railway—and so opposed to the interchange both of “things” and of “persons” that it was essential that practical international co-operation should go hand in hand with the perfection of nationality to prevent national insulation. Hence the formation of international unions. Again, nationality is so opposed to international control that of necessity the completion of nationality demanded international freedom of contract between States as contracting entities. Naturally international contracts had their arbi-

tration clauses by which, in general, future differences might be adjusted in the same way as particular issues had from time to time been settled. These are some of the reasons for the extension of the principle of international arbitration. The lead which has been taken by Great Britain is due to causes apart from any racial tendency or natural bias towards peaceful solutions. In days of sea-power the least insular of States is an island State, and the least insular of Empires is a confederation of widely-scattered islands.

The difficulties which had to be surmounted when once the value of arbitration for the settlement of international differences had been fully recognised arose from the following questions: (1) What issues were properly the subject of a general agreement for compulsory reference? (2) What should be the code of International law to be applied? and (3) How were international tribunals to be constituted and given a concrete shape and procedure? To some degree the Hague Convention advanced the codification of International law. There had been a long line of progress in the evolution of a code of International law capable of being applied in the adjustment of international disputes. The possibility of parts of the Law of Nations being further codified was demonstrated. The best example of this is without doubt the convention with respect to the laws and customs of war on land. To use the phrase of Oppenheim, "it represents a model the very existence of which teaches that codification of parts of the Law of Nations is practicable providing the Powers are seriously inclined to come to an understanding." To some extent, also, the Hague Convention facilitated arbitral references. The principal work was, however, in the direction of the establishment of international tribunals. Thence followed the advance in the formation of judicial procedure as applied by these Courts of arbitration. Lastly, we have witnessed

a numerous series of agreements—both special and general—between two individual States for submissions to arbitration. None of these agreements, it will be observed, can be said to have been arrived at between groups of States, although in many instances the same provisions are inserted in two or more of such treaties.

Now it must be apparent that the root difficulty in the way of the extension of the principle of international arbitration, is the absence of sanctions by which international legislation may be prescribed as a rule of conduct to civilised States, or by which the arbitral awards of arbitration Courts can be enforced. The codified rules may be recommended with all the force of universal acceptance; again agreements to refer may be concluded with every formality and solemnity; but the fundamental difficulty through past centuries has been that they cannot be enforced for the simple reason that apart from a coalition for the purposes of war there has been nothing in the nature of an international executive. Again, the international arbitral awards can be delivered by the International Courts, set up by universal agreement and available for the resort of litigant States; but these awards (apart from provisions of enforcement contained in the particular submission, and few instances of such provisions exist) have no sanction.

There are two views possible on this question. There is the view which, held by many writers, has perhaps been best expressed by Professor Westlake. "Logic may reiterate the warning that there is no security for their being carried out; but the theoretical imperfection of arbitrations arising from this cause is not felt to be practically a great deduction from the value of the service which they can render to peace." To this view can with some force be opposed the following propositions. The enforcement of an arbitral award is of far more consequence than the

declaration in that award of a rule of International law. Rules of International law gain their real effectiveness from their unchallenged existence for a length of time, and by the quiet and almost automatic exercise of them by the general body of civilised States. Indeed, there is an actual advantage of their being free from rigidity, because they are capable, without violence, of adaptation to the changing conditions of the world. It is otherwise with the enforcement of an international award. The non-enforcement of any particular judicial decision (not repugnant to the general sense of the community), when such non-enforcement arises from the weakness of the executive, is in any State far more dangerous than the non-recognition or the non-observance by tacit consent of general law. The mischief is not merely the doubt thrown upon the correctness of the rule of law applied, or the justice of the particular decision, but the discredit and distrust affecting the whole body of law, and the whole machinery for the administration of the law. So in the administration of applied International law an isolated failure of enforcement has more malignant force than can be counterbalanced by very many instances where obedience has followed a decree.

It has been pointed out by Professor Lawrence in his essay, *The Evolution of Peace*, that there have been four stages in the evolution of a national judicial system from a condition of private war:—

At first every man has to protect himself, and the injured party depends entirely for redress upon his own and his family's power to secure it. Then the customs of the community, and the laws promulgated by its rulers, impose limitations upon the right of private vengeance. It is regulated and directed, but not forbidden. Though limited in operation, it still remains the chief, if not the only, means of punishing wrong. The third stage is reached when side by side with it there exists in full operation an alternative method of doing justice between man and man, and making criminals suffer for their misdeeds. This method is that of trial before impartial State tribunals, who decide each case on its merits as administrators of a passionless law. So great are the advantages of this system, that both spiritual and temporal rulers bend their energies to the task of securing its universal adoption. In time their success is complete, and the fourth stage is reached by the entire abolition of the old right of unregulated and self-inflicted vengeance.

The four stages may be summed up as follows: (1) unrestrained personal conflict; (2) regulated private war; (3) collateral judicial tribunals; and (4) the rule of law.

It has been suggested that a similar sequence of stages are evolving from the system of the determination of international issues by public war, a system by which those issues can be determined by the establishment of international judicial order. The analogy is very seductive, but by no means free from danger. A highly organised Court of Justice depends upon two things, which precede its effectiveness. It must administer law which has emanated from a duly organised legislation. It must have the authority of a duly organised executive to put into execution its decrees. In both these respects the position of an international tribunal differs from a national Court of law. There is no sovereign legislature: there is no sovereign executive. There is a third respect in which the International Court of Arbitration is apt to be defective, and that arises from the difficulty of enforcing a citation. We propose to deal with these points in the following order: (a) the enforcement of a citation (b) the administration of a body of clearly defined and clearly accepted law, and (c) the executive enforcement of arbitral decrees.

The Permanent Court of the Hague cannot compel the recourse of a State litigant, but can only wait with folded arms until that litigant enters an appearance. That Court cannot impose a construction of the law without being liable to have that construction repudiated by the litigant State. That Court cannot pronounce a decree without confronting the possibility of an international "passive resister." It has however come into existence as a permanent fact, it has come into operation, and it has begun to form procedure and to establish precedents. Apart from cognate illustrations afforded by its decisions, it has begun to evolve a system of international procedure, having regard

to very varying systems of law, of pleadings, of language, and of national environment. It has had of necessity to contend with the suspicion with which each State litigant would view the application of judicial methods other than its own to the ascertainment of an issue in which it is clearly concerned.

In the progress of every society a considerable time elapses, after the right of an individual either to an interest in property or to a control over his own actions has been recognised, before a compulsory system of distributive justice can be said to be completely established. The right of a compelling citation to the tribunal in order that the opposed may hear judgment, the right of demanding from the tribunal the pronouncement of a judgment, and the right of insisting upon the effective execution of the judgment pronounced; these become the ordinary sanctions of contract, of status, or of freedom from molestation, long after the recognition of status, of the right to personal freedom, and of the obligations of contract, express or implied, have become complete.

Now, during this transitional period every dispute (unless it involves an offence against the State when there is an intervention of a *force majeure*), not submitted to the arbitrament of a private war, can only be determined in one of three ways. There can be an agreement between the disputants, limited by mutual fear or mutual respect, having its basis in mutual concession and its sanction in mutual advantage. There can be the intervention of a friend, in which the fear of or respect inspired by the intervener or by his judgment is added to the former inducements. There can be a reference to the decision of some impartial person whose wisdom and equity have gained the confidence of each of the opposed, and whose judgment has the sanction derived from the very grounds for the submission to him. It must soon have been found that something more than

any or all of these was wanting to secure the ready and uniform obedience to the agreement, or the judgment, or the award, and hence the added sanctions to arbitral decisions which are found to have been in force from very early times.

Even after the science of law has been succeeded by the science of its administration, and Courts have been established with a regular course of procedure, with the power of compelling recourse when a party has been cited, and compelling obedience when a party has been decided against, many reasons have concurred, such as the prevention of expense, the avoidance of technical pitfalls, and the desire to bring about not only a settlement of the particular dispute, but also a state of peaceful relationship between the parties, to induce persons in controversy to have recourse to a domestic judge chosen by mutual consent and armed with the powers of mutual convention. What has taken place, and often will take place in the case of private litigants is, as we have seen for fundamental reasons, the ordinary and essential system in the case of every litigation between States.

Now this historic sequence of progressive arbitration affords (what the evolution of a Court of law administered directly or indirectly through the sovereign power in a State cannot afford) the true analogy to the progress of international arbitration. First an agreement between the States themselves with mutual concessions to remove the causes of a standing controversy. Then the recourse to the offices of a friendly neighbouring State free from the bias of self-interest, and adding the weight of its influence to the scale of its decision. This mediation, as Halleck points out, differs from amicable arrangements or compromises on the one hand and from an arbitration on the other, in that there is no decision, either by surrender or decree, of any matter in dispute, but merely a reconciliation of conflicting opinion and a moderation of adverse

pretensions. And then in due course we arrive at the erection of an international tribunal either constituted for the settlement of the particular international dispute, or constituted for the settlement of all international disputes coming within certain limitations. To this Court of Arbitration there may be a submission by the States of the particular issue (as in the case of the submission of an isolated dispute arising between individuals), or there may be between them a general agreement to submit all disputes answering a particular description (as in the case of a general clause of arbitration in articles of partnership or the like), not extending into an excluded area, as for example, in the case of dispute affecting the existence of the State itself.

It follows from the foregoing that the analogies for the determination of the methods by which international arbitral awards are to be brought into existence and enforced, must be derived from the system of individual arbitration, and not from the system of distributive justice administered by National Courts.

Now there are two great difficulties which confront a litigant who cannot have recourse to a Court of law in the ordinary sense in which the description is used, that is to say, a Court of Justice which does not depend for its effective jurisdiction upon the continuous and mutual desire of the litigant parties to obtain and recognise its degree; first, the compulsory citation of the opposer, so as to force him to submit to the jurisdiction; and, secondly, the power of enforcement of the judicial decree against the will of the opposer. Both these difficulties are present in the case of every international arbitration. There may be an agreement to submit a particular question, or every question of a particular description or in a particular class, according to whether the agreement for the submission be singular or general, but in any case before the actual hearing of the

issue there may be a withdrawal of one of the litigant parties, and in the case of a general agreement to submit there may be the refusal to treat a particular issue as coming within the scope of the agreement. It may be said that international comity would forbid such a violation or such a deviation, but it is precisely where international comity is weak that the liability to such a violation or to such a deviation would naturally recur. In other words it is desirable that sanctions should be devised, automatic in their action, which may be so incorporated in every agreement of general submission that the citation of the opposer would spring from the very existence of an issue, and that an appearance before the Court would follow the citation as a matter of natural sequence.

Again, let it be assumed that the award has been given, how is it to be enforced? If it be not enforced, then the original grievance of the successful litigant State has become intensified by an injustice following on a breach of faith.

The difficulty of enforcing private awards was of necessity felt from the earliest times. In so far as the enforcement of awards in England (before comparatively recent legislation), the system may be taken to have been derived from the Code of Justinian. Before dealing with that *præ-statutory* system we may point out that the modern system is merely the almost automatic transmutation of a duly constituted award into a Rule of Court with all the authority of a judgment declared by the Court. In other words, the Court of Justice reaches down and takes up an award, and gives to it the sanction of its own machinery of enforcement. Now that is a much later stage than international arbitration has yet approached. It may be the ultimate stage, but it presupposes something in the nature of an international executive the beginnings of which are not yet even in project. The nearest approach to an international executive

which the civilised world has ever seen in the sense of a sovereign Power compelling the obedience of the circle of sovereign Powers, would be found, and found alone, during the Mediæval Supremacy of the Bishop of Rome. The Papal Power with its ecclesiastical weapons might, and often did, compel obedience to what were in effect awards in international arbitrations, and in a number of instances its intangible influence must during the Middle Ages have both removed the causes, and enforced the decrees which removed the causes, of State litigations. Possibly a modern, though distant, analogy might be found in the coming power of the United States of North America over the destinies of the South American States, with the collateral extension of the Monroe Doctrine and the doctrine of external responsibility.

Apart from the clothing of a private award with the robe of State recognition, there were three sanctions which were not uncommonly inspired by the very terms of the submission. We exclude the method of the bringing of an action upon the award to obtain the judgment of a State Court, because that would be the entry upon a fallacious circle, since the assumption from the point of view of international arbitration is that the sanctions of a State Court are unavailable. In fact, an action upon an award is merely a claim upon an account stated, and only if the Arbitration Court merely answered the province of a Court of Valuation depending upon a collateral Court of Execution, would that analogy have any value. Still further away would be the method of enforcement by attachment, because the power to attach is sovereign and the method is the reverse of amicable.

Now the first remedy was that which was provided by the Roman law, that is to say, the penalty. In order to be effective without recourse to the Courts, the penalty must be a Gage, because an action to recover a

penalty must in itself suppose the sovereign executive. Now the "*Vadium*," a gage by way of security, in mediæval times was to lawyers either a live or a dead pledge, that is to say, it was either transferred to the possession of the person intended to be secured, to be by him applied until he had therefrom derived that for which security was given, or it was retained by the person giving the security until the happening of some event of defeasance which entitled the mortgagee to claim its possession. In international relations the object underlying the settlement of disputes is not only the removal of the grievance or the adjudication of the cause of contention, but the adjudication for the purpose of avoiding, and in such a way as to avoid, further dispute. Therefore the gage must be such as upon the declaration of the award automatically remains with the possessor, or at any rate which needs no further step in order to secure its possession by the successful litigant State. The possession of the gage by a third party, or its control by the Arbitration Court itself; these with proper safeguards would be sufficient to avoid the friction. The gage in some instances would be territory, in some instances would be money, or its equivalent; in some instances it might be an edict pronounced by the sovereign power of the litigant State, or a treaty declared by the litigant States, and in either case made subject to and needing only the authority of the Arbitration Court to make it effective.

The next method which appears to have been adopted for the purpose of enforcing awards, was that of Guarantee. There are international relations where, either from the relative superiority of a State (we have instanced the United States of North America in relation to the independent States of South America), or from the exceptional obligations between States, the performance by a State litigant of any obligation to be imposed on that State by an international award may be the subject of a guarantee, and such guarantee may be either national or international.

Another sanction which might be added to this armoury of international arbitration, is the general suspension of diplomatic relations with a State, after its persistent refusal to obey the award of an international tribunal. Perhaps the nearest analogy to this would be found in the proceedings which in the Middle Ages might often be found to have been taken by the constituent members of a commercial confederation, like that of the Hanseatic Towns, in instances where there had been a refusal or neglect to comply with the rules of the League. The "unhansing" of a litigant State would not in any way imply anything in the nature of an act of war, that is to say, it would in no way affect the safety or condition of the citizens of, or the inhabitants in that State, whilst it would have the effect of, for the time being, excluding that State from the circle of international comity.

These are some of the considerations which may lead to the ascertainment of an effective sanction to arbitral awards. The difficulties inherent to the question are very great, but the value of such a sanction, if one could be found, can scarcely be exaggerated, seeing that in every other direction—in the agreement to refer, the constitution of the Court of reference, the code of International law, and the procedure of its application--the system of international arbitration is rapidly making its way as the accepted solution of every strife between the nations of the world.

AULA GENTIUM.

III.—SOME LEGAL ASPECTS OF THE SUBMARINE CABLE AND WIRELESS TELE- GRAPH IN WAR.

THE gradual enlargement of the Theatre of War to the enormous area it has covered in recent hostilities has proceeded in co-relation with, and in dependence upon, the

provision by each belligerent of adequate means of communication with the outlying portions of the forces which he has under his control. Since the extent to which this communication can be effectually and continuously established is one of the most important factors in determining the chances of either belligerent of bringing his campaign to a successful issue, it naturally follows that the facilities which either may possess for preventing or intercepting communications to or from the other will be of enormous service in defeating or anticipating the latter's movements and designs.

Under modern conditions of warfare it becomes necessary for each belligerent to maintain several armies, each to some extent independent of the others, but only fully serviceable so long as it is taking part in a preconcerted plan, either of attack or defence, and as a unit of the whole fighting force. This condition of maximum utility is only maintained whilst each of these units is under the complete direction and control of a common leader whose endeavours are directed to make them interdependent, a result which can only be produced so long as he is able to maintain uninterrupted communication with them, and they with each other.

Moreover, the necessity almost invariably arises for each belligerent, whether in the field or at the seat of his Government, to send to or to receive, from persons not directly concerned in the war, communications of a nature that will largely influence the course of hostilities.

This characteristic of warfare being in many respects of comparatively modern origin, it happens that, whilst it is a matter of excessive importance that there should be some agreement amongst nations as to the rules to be applied *inter se* in determining the extent to and the conditions under which these communications may be made or intercepted, yet it cannot be laid down with certainty in any

pending or projected war what rules will be observed for the purpose of regulating the rights of neutrals to send, and of belligerents to send or intercept, communications during the progress of the war, for no complete set of such rules is in existence. And, owing to the subject having by no means reached finality, and the consequent difficulty of seeking out the proper perspective to trace the lines upon which it is being developed, it is by no means an easy task to formulate a set of such rules which shall meet the exigencies of modern warfare and provide for the novel means of communication which are constantly being introduced.

The subject is essentially one for treatment by an international convention at which it could be discussed in all its modern bearings, and with the recent experience of at least two wars in the conduct of which so much needless friction has been caused, or largely contributed to, by the absence of any fixed rules. For it is to be observed that the strategical conduct of the hostilities being left to those who are scarcely competent to come to an immediate decision upon any legal difficulty which requires instant solution, it is scarcely to be expected that they should do justice to a question in which the simple impulse of humanity, or an instinctive perception born of pressing necessity, are useless in leading the mind to a proper exercise of judgment; differing in this respect from many of the rules of war and neutrality which have been made the subject of express international agreement, but as to the subject-matter of which the conduct of the neutral or belligerent would seem to have been fully capable of being directed by the simple dictates of humanity and common-sense. Such, for example as the rules regulating the choice of missiles, the treatment of prisoners of war and the behaviour of one belligerent towards the peaceful members of the State of the other.

The most important means at the present time whereby

such communications as have been referred to above can be effected are:—

1. Telegraphy, which may be operated—
 - (a) Through a wire over the land;
 - (b) Through a submarine cable; and
 - (c) Without any physical connection, but by means of the invention known as Wireless Telegraphy.
2. The telephone.
3. Agents with verbal messages.
4. Written despatches or messages.

It is proposed to deal firstly with the rules by which belligerents and neutrals should be governed in the transmission, receipt and interception of messages during war by means of the submarine cable, and, as ancillary thereto, the treatment which should be accorded to the cable itself. Secondly, of the rules applicable to such transmission, receipt and interception of messages by means of Wireless Telegraphy with the legal position of the apparatus used for the purpose.

THE SUBMARINE CABLE, when once properly established between two countries, constitutes a means of communication so effective, secret, and free from the risk of being tampered with, that the facilities which a belligerent possesses for sending messages by means thereof are frequently of incalculable service in enabling him to carry out certain operations in his hostilities. Although it frequently becomes of the most vital importance for one belligerent to circumvent the other in the transmission or receipt of communications by cable, there are frequently involved the rights of parties outside the sphere of hostilities, and who are entitled to the rights conferred upon them by the Laws of Neutrality. Moreover, there are various practical difficulties which frequently arise to prevent the interference by

one belligerent with the cable of the other, for, having regard to its importance, stringent precautions will usually be taken to guard at any rate the terminals of the cable, which is not at all easily cut or even traceable at any appreciable distance from the shore. Also, the enormous cost of relaying after peace has been restored should, and often will, cause either party to carefully consider whether the risk to be incurred if the cable is allowed to remain intact is sufficiently serious to justify the enormous damage and loss which would be involved by its destruction.

Notwithstanding the abundant evidence of the necessity for some settled rules governing the use of the cable, as the events of recent wars testify, it is curious to note that, with some exceptions of not very great importance, international lawyers and diplomatists studiously avoided the subject until the year 1902. In that year the Institute of International Law, at their conference held in Brussels, laid down (though as an expression of opinion only) certain very important rules intended to settle all points of difficulty upon the subject. These rules, which are of considerable importance and interest, will be set out and discussed more fully below.

The first diplomatic recognition of the difficulties likely to accrue from an unsettled state of opinion as to the effect of war on the use of the Submarine Cable, probably occurs in a treaty concluded on May 16th, 1864, between France, Brazil, Hayti, Italy and Portugal. Although the cable, for the preservation and control of which the treaty was intended to provide, was never constructed, yet the treaty itself is of interest as showing the perception of the complications and difficulties that might ensue in the course of a war if the cable were laid down without any settled agreement as to the regulations for its control therein. The contracting Powers agreed that they would not in the event of war cut or destroy the cable, and would recognise the neutrality of the telegraphic line. A treaty of this character, made, as it

was, with the express object of regulating the conduct of the parties while hostilities lasted, would not of course be abrogated by the outbreak of war amongst them; and they would appear to have compromised themselves in a very serious fashion, for it was not possible for them to judge in what important respects, their freedom of action being thus restricted, they might be prejudiced by the transmission over the cable of communications exceedingly harmful to their cause. It has been remarked with some pertinence that those responsible for the treaty had forgotten to consult naval and military authorities, and, as it would be on them that the duty of giving effect to the treaty would fall, the omission was a serious one.

A remarkable proposal was that brought forward by America in 1869, in a scheme which she submitted to all the Powers, with the intention that a conference should be called to deliberate thereon. The drastic course was suggested of placing the destruction of cables on the high seas, either in time of peace or during war, in the same category of unlawful acts as that in which piracy is found. The proposition was illogical and impracticable in the extreme. For the main and underlying principle of piracy lies in this, that the acts by which it is constituted have been committed without authority from the State of the offender, whereas the cutting of a cable would never be effected save at the request and for the purpose of a belligerent State, since the advantage which a lawless rover might derive from such an act is difficult to imagine. Moreover, the effect of setting as a sanction against the cutting of a cable the penalties attaching to piracy, would be to make the cable in almost every instance inviolable, save, perhaps, in the case of a belligerent strong enough to resist any combination of neutrals desiring to enforce the sanction; since any neutral could (on the ground that a pirate is the enemy of the whole human race) take coercive measures to prevent the

destruction by a belligerent of a cable which was being used to his (the belligerent's) detriment, without the risk of being accountable as for a breach of neutrality.

Further details of America's proposal were that communications by means of cable were to continue as well in times of war as during peace; and that Governments were to exercise no control over the despatch of messages.

As we shall find that both these points were dealt with afterwards, and their impracticability established, they can be left for the moment with the remark that the conference suggested did not meet.

A considerable step forward in the right direction was taken by the Committee appointed by the Institute of International Law, in 1878, to consider "The means of protecting against destruction in time of peace and in time of war Submarine Telegraphs which are of International importance."

The recommendations in substance of the Committee were:—

1. Where the cable connects two portions of the same country no measures can be taken to ensure the maintenance of communication during war. The service may be suspended or the cable destroyed by the belligerent whose territories it connects, whether it belongs to the Government or to a private company, this being purely a question for the Municipal law of the country. In the same way, the other belligerent may destroy the cable either on the high seas or in territorial waters.
2. Where it connects the territories of the belligerents with each other, either has the right to cut it.
3. Where it connects the territory of one of the belligerents with that of a neutral, the belligerent on whose coast it terminates, has the right to restrict or forbid communication. (This, the Committee point out, is a consequence of the right of sovereignty recognised by the Convention of St. Petersburg.) The other belligerent ought to respect the cable, since communications between neutrals and belligerents is permitted. If, however, the other belligerent should be able to obtain possession of the portion of the enemy's territory where the cable ends, he could, in virtue of the rights conferred on him by his occupation, take any measures he might judge necessary for his defence, and these might frequently include the destruction of the cable. The permissibility of communication between neutral and belligerent is subject to the rule that a neutral may not communicate with a blockaded port, and therefore the belligerent may cut any cable running from neutral territory to the blockaded port, just as he may seize a packet boat carrying despatches.

4. Where it connects the territories of two neutrals with each other, the strict rule is that destruction or even momentary interruption by either of the belligerents is never justifiable.

An exceedingly rational view of the matter is taken by the Committee in the conclusion to their report, wherein they express their recognition of the impracticability of the suggestions contained in the United States scheme of 1869, stating: "We cannot hope for an international convention which should declare in all cases that cables cannot be destroyed and the service must never be interrupted; this degree of security for international telegraphs will only be obtained when war itself has disappeared." After stating that the only case in which the cable is inviolable is where it connects the territories of two neutrals, they put forward the suggestion that when military necessity demands that telegraphic communication shall be stopped, an arrangement might be come to whereby the communication should cease without the destruction of an establishment which perhaps cost millions.

The Committee proposed certain conclusions which as finally adopted, after a discussion resulting in their material alteration from the form in which they were first submitted to the Institute, are as follows:—

1. The telegraphic submarine cable uniting two neutral territories is inviolable.
2. It is to be desired that when telegraphic communications ought to cease in consequence of a state of war, that the belligerents confine themselves to measures strictly necessary to prevent the use of the cable, but where it is necessary to destroy the cable, that the belligerent causing the destruction may repair the consequences of his acts as soon as the cessation of hostilities will permit him.

The first recommendation of the committee in favour of the unfettered right of a belligerent to cut a cable connecting two portions of its own territory would appear to be superfluous, firstly because it would be absurd to deny the right of a State to deal as it thinks fit with its own property, or even (so far at all events as other nations are concerned) with that of its subjects; and secondly, because in the absence of the

interests of any other nation being concerned the point is outside the sphere of International law.

The second recommendation is thoroughly sound and incontrovertible, following as a logical result from the right of every belligerent to destroy such of the property of the enemy as may tend to harass him in the conduct of the war, and so as the destruction is not wanton.

As to the third recommendation, it may be permissible in theory to lay down that a belligerent, possessing the right to cut a cable connecting his territory with that of a neutral (which cable, however, the other belligerent must respect), is to lose that right with his dispossession from the portion of his territory on which the cable rests, and that his enemy dispossessing him is to be thereupon invested with a similar right. Yet the proposition is open to the serious practical objection that on a mere invasion of the territory the enemy would proceed to cut the cable and then set up as a justification that having obtained possession he considered he had *de facto* obtained the right of sovereignty following from military occupation, whereas he might in fact be compelled to relinquish his position after so short a period of occupation as could in no sense be considered to have given him any such rights. Yet the cable having been cut, and the justification or otherwise depending on a condition so difficult in most places to establish or disprove, what tribunal could with certainty decide whether the rules of International law had been violated?

From the fourth recommendation an important exception seems to be omitted, viz., that the duty of non-interference by the belligerents with a cable connecting the territories of two neutrals is subject to its not being used to convey the messages of either belligerent. For if this use were made of it, the party injured would, on the ground that an unneutral service had been rendered, be clearly justified in taking steps to prevent the repetition of such acts, even

though the destruction might be thereby involved. This omission is supplied by Rule 4 of the Articles (referred to below) laid down by the Institute at its meeting in 1902.

The next authoritative pronouncement on the subject contained a clause which once again brought out prominently the vague and uncertain state in which it existed. This is Article 15 of the International Convention for the Protection of Submarine Telegraph Cables, which provides that freedom of action is to be reserved to belligerents.

A considerable period elapsed until in 1902 the Institute of International Law again took the subject in hand, when it adopted the following five important rules:—

1. *Le câble sous-marin reliant deux territoires neutres est inviolable.*
2. *Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre.*
3. *Le câble reliant un territoire neutre au territoire d'un des belligérants ne peut en aucun cas être coupé dans la mer territoriale ou dans les eaux neutralisées dépendant d'un territoire neutre. En haute mer, ce câble ne peut être coupé s'il y a blocus effectif et dans les limites de la ligne du blocus, sauf rétablissement dans le plus bref délai possible. Le câble peut toujours être coupé sur le territoire et dans la mer territoriale dépendant d'un territoire ennemi jusqu'à d'un de trois mille marins de la laisse de basse-marée.*
4. *Il est entendu que la liberté de l'Etat neutre de transmettre des dépêches n'implique pas la faculté d'en user ou d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants.*
5. *En ce qui concerne l'application des règles précédentes il n'y a de différence à établir ni entre les câbles d'Etat et les câbles appartenant à des particuliers, ni entre les câbles de propriété ennemie et ceux qui sont de propriété neutre.*

As to these, it is to be observed that Rule 1, subject to the qualifications involved by Rule 4, is not open to question, and any acts constituting a breach would clearly be of a hostile nature, and would justify the neutral in proceeding accordingly.

The limitation imposed by Rule 2, as to the place where the cable may be cut, omits to provide for the case where a

neutral is permitting one of the belligerents to communicate from the station on its territory with its Government at home, in which case the other belligerent would be justified in cutting the cable even in the territorial waters of the neutral.

The Naval Code of the United States of America lays down three rules on the subject, which are of an exceedingly questionable and vague character. They are as follows:—

1. Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.
2. Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.
3. Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.

Rule 1, so far as it relates to a cable between the territory of the United States of America and the enemy, omits to distinguish between the United States of America being the other belligerent and being neutral; since in the latter case the law is, as we have already seen, quite different from that to be applied in the former.

Rule 2 is altogether too wide. The cable between the enemy and neutral territory can only be cut either where the cable terminates at a point in the enemy's territory which is being blockaded, or where the neutral is allowing the enemy to use it for the purposes of his war.

And Rule 3, if adhered to, would compel the United States if involved in a war to stand by and allow their enemy to use the neutral cable even for hostile purposes.

In the early days of the submarine cable their establishment necessitated such a length of time as rendered it impossible for one to be laid down for the purposes of a pending war. However, recent progress has considerably lessened the difficulties to be overcome and nations are now liable to be confronted with the question of how far they are

entitled to establish or permit the establishment of a cable in time of war. The solution of this question naturally follows upon the rules to be observed as to cutting or interrupting the cable when once established. In the war between the United States and Spain of 1898, the United States asked permission from England to establish at Hong Kong a cable which they proposed to lay from Manilla, in which they had succeeded in establishing their military occupation. This cable was of course intended for the despatch and receipt of telegrams relating to the war, and Great Britain therefore refused her consent, basing her refusal on the ground that if she allowed the United States to do as they requested she would be compromising her own neutrality. The United States recognised the justice of this decision and did not press the matter further.

From this short *résumé* of the attempts that have been made to establish complete agreement on this vexed question, it will be seen that nations are nearly as far off as ever from this desirable state. Moreover, even if there were such rules, the unforeseen predicaments in which belligerents might find themselves would no doubt often necessitate in their view the breaking of any rule that might exist, and it is almost better to do without specific rules altogether than rely on those which may be broken whenever their observance is inconvenient, since in the latter case, fearing breach by the other, each neutral would be almost sure to act towards his enemy in that respect as if he had actually committed a breach.

The suggestion has recently been put forward by Sir John Macdonell that the most effective solution of the difficulty, at any rate pending the unsettled conditions at present prevailing, is to provide for adequate compensation being granted to those who suffer from the belligerent's destruction of their cables. The suggestion is a valuable one, and whilst affording the owner of the cable the relief to which he may

morally be entitled, it would no doubt prevent in many cases mere wanton destruction upon a baseless ground.

The subject will no doubt very shortly receive the attention of those responsible for the compilation of International law, and we shall then have definite rules governing the rights of the belligerents and neutrals in the matter. The proper solution of the question no doubt lies in a judicious combination of the three principles of (1) Restriction of use without actual destruction : (2) Compensation where destruction becomes absolutely necessary : and (3) Re-establishment after destruction. If belligerents are placed under liabilities of this character they are not likely to act without sufficient justification, and in all cases neutrals would appear to be protected so far as they can reasonably expect in the unsettled times of war.

WIRELESS TELEGRAPHY: The statement of Sir Henry Maine that "the rapid progress of the inventive science of modern times has tended to entirely refute Grotius when he says that war is not an art," although intended with special reference to the direct weapons of warfare, has just as great an application when spoken of the more indirect weapons of modern warfare, such as those for effecting communication in course of war. Of these the most wonderful is the system, by means of which messages are despatched between two points not connected by any material means, known as wireless telegraphy. In theory there should be no more difficulty in providing proper regulations controlling the transmission of messages by these means than by any other, although in practice the difficult and unusual mode of operation requires such ideas as are established to be applied to the new conditions, which is not easy to quickly carry into effect. Moreover, as has been pointed out, the question is calling for solution while the analogous question of the submarine cable is very far from a settled state, and we are

therefore without the assistance which might be derived by way of analogy from proper regulations (if they existed) on that subject. The invention will not alter the principles of International law, but only calls for the adaptation of those principles thereto.

The chief obligations under which neutrals, belligerents and private individuals appear to be, and the rights possessed by them regarding the use of wireless telegraphy, are as follows :—

1. A neutral must not allow a wireless station to be set up on its territory for the reception or transmission of messages by belligerents. It is clear that to permit this would be a breach of neutrality. The duties under which neutrals lie in time of war are threefold, viz. : the abstention from the actual commission of acts calculated to assist either of the belligerents ; the prevention of his territory or property being used for hostile purposes ; and the acquiescence in certain acts which but for the existence of a state of war would be unlawful. It is clear that a neutral violates the second of these duties if he does not prevent his territory from being used for the reception and transmission of messages by wireless telegraphy by either belligerent. During the recent Russo-Japanese war the garrison besieged in Port Arthur installed an apparatus in the town whereby they were enabled to get into communication with a station erected by the Russians in Chifu, a town in China, and thence with the army in the field and the Government at home. Japan took exception to China's action in the matter and requested them to destroy the apparatus ; which request, after some delay, was complied with.

2. Neutrals must not by means of wireless telegraphy communicate with a port which is being blockaded. This is an ordinary consequence of the law regulating blockades, and any vessel acting contrary thereto will be liable as for a breach of the blockade and subject to all the attendant penalties.

3. A neutral must not employ any of his ships in transmitting messages by wireless telegraphy for or intercepting messages to either of the belligerents. To do so would be a breach of the duty of "abstention" mentioned under (1).

4. Neither a neutral Power nor a private individual may employ a vessel to gather information regarding the movements of one belligerent with a view of its being supplied to the other. If such information is obtained by clandestine methods, those responsible, if caught *flagrante delicto*, are liable to be treated as spies. If, however, they are acting openly, they are liable as having rendered an unneutral service, and their ship is subject to confiscation, and the officers and crew to be dealt with as prisoners of war, just as if they had carried despatches for the enemy.

This question arose in an interesting fashion during the Russo-Japanese war. The newspaper correspondent of the *Times*, despatched by his paper to the Far East to obtain information for their readers regarding the war, fitted up a vessel, *The Haimun*, with a wireless telegraphy apparatus, after having established a corresponding station at Weihaiwei, a British Possession which was in telegraphic communication with Europe. The correspondent on *The Haimun* did not content himself with obtaining general information about the war, but even went so far, on his own admission, as to intercept the Russian and Japanese messages sent by similar means, although, as they were sent in cypher, he did not, nor, in fact, could he, make any improper use of them. This conduct, however harmless in intention, came perilously near the doctrine of, and rendering the operators liable to the penalties, of an unneutral service, and both the Russians and the Japanese took steps to get rid of the vessel. The Russians took a very stringent view of the matter, and addressed, through the usual diplomatic channels, the following Note to the Powers:—

“I am instructed by my Government in order that there may be no misunderstanding, to inform your Excellency that the Lieutenant of His Imperial Majesty in the Far East has just made the following declaration:—In case Neutral vessels having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwang Tung or within the zone of operations of the Russian Fleet such correspondents shall be regarded as spies and the vessels provided with such apparatus shall be seized as lawful prizes.”

Count Cassini, the Russian Ambassador to New York, in explaining the Note, said that it was intended to apply to the entire waters within the Zone of War, that is even beyond the three-mile limit.

It must be admitted that Russia had considerable ground for objecting to what was being done, although the position taken up by her in the Note was absolutely untenable. It could scarcely be expected that Russia should permit the sending of wireless telegraph despatches from which the Japanese who had the necessary apparatus on their ships could gain valuable information. The *Times* correspondent considered that the Russian objection was based on their desire to keep secret the reverses which they were at that time sustaining, but no doubt their reasons were more serious and justifiable than that. Russia attempted to justify the action taken by her on the ground that when the Japanese took Port Arthur they found in the office of the Chinese Staff a pile of telegrams by means of which the English Squadron, at that time in the neighbourhood, had kept the Chinese informed of the movements of the Japanese Fleet. They contended also (and with some force) that the genuine war correspondent is attached to one of the belligerent forces, and does his work under the supervision and subject to the censorship of the military authorities.

In justice to the Russian view, and whilst in no way intending to support a proposition which is without any doubt erroneous, it should be pointed out that a person who intercepts a despatch from one belligerent and transmits it to another is a spy, if he collects the information secretly.

Now the question is, whether a vessel, which is cruising far out of reach of the belligerents, who are ignorant of her exact whereabouts, but carrying with her instruments attuned to intercept any messages which may be sent by one of the belligerents unconscious of the fact that his message is finding a destination entirely unexpected by him, is in fact obtaining information secretly. The question of secrecy is largely to be determined by the possibility or otherwise of the presence of the eavesdropper being discovered. Of course, before this invention the eavesdropper had to come right into the actual presence of the enemy, when the only way he could escape detection was by disguise. But it is difficult to see that there is much to distinguish between the conduct of a person who changes his appearance to deceive, and that of a commander of a vessel who, cruising about with the supposed object of discovering news, and only tolerated on that ground, intercepts messages not intended for him; for if it were known before he commenced his cruise that that were his object he would of course be compelled to desist, and so he may to some extent be said to take up his position under false pretences.

It was also contended that the commander of the *Haimun* did not come within the definition of a spy since he did not communicate the information obtained by him to the other belligerent but only to his newspaper. But it should be pointed out that, although in this case it did not happen, yet it was not outside the region of possibility for the vessel to have interrupted a communication of great importance for Russia to keep secret, and sent it to his newspaper, which would have reproduced it with the possible result of circumventing a plan of great moment to Russia by giving knowledge of it to the world at large, including Japan.

It has also been urged on Russia's behalf that a correspondent on a ship is not subject to the same censorship and

control as is exercised over correspondents with a belligerent or on board a man of war. Before they are allowed to join, it is pointed out, they have to accept conditions laid down by the State whose forces they accompany, and they must always submit their despatches to an officer appointed for that purpose who exercises the widest powers over them.

A further argument was, that it was perfectly legitimate to decide that within the sphere of hostilities apparatus for the transmission of despatches should be seized as material of war. That proceeding it was contended is as natural as the occupation of a post office on land. And even if the correspondents provided with such apparatus had no intention of giving information to the Japanese ships, yet all that the latter would have to do would be to instal similar instruments on their own vessels in order to intercept news not perhaps intended for them.

The *Times* correspondent admitted that if he had insinuated himself within the Russian waters and thence communicated with the Japanese he might have come within the description of spy; but of course he denied having done this.

The Japanese took the more reasonable and justifiable course in the matter, contenting themselves with placing an officer on board who was to exercise control over all the messages. The effect of his presence, having regard to his orders, was to render the vessel useless.

(5) A neutral or private individual may not intercept on land messages which are being sent or received by one of the belligerents with a view of using them to his detriment. Any act of this character would be treated by the belligerent as an unneutral service and punished accordingly.

Whilst upon the subject of Wireless Telegraphy, reference should be made to the Wireless Telegraphy Act of 1904, although it does not strictly belong to the province of International law, being confined merely to the relations

between Great Britain and her subjects, and therefore forming part rather of the Municipal law. The object of the Act, as stated by Lord Stanley in the Memorandum explanatory of the Bill published when the latter was before Parliament, is to secure the control of all wireless telegraphy installations belonging to subjects or inhabitants of Great Britain, so that in the event of war they may not be used to her detriment. The Act provided that no person shall, under pain of fine or imprisonment, establish or work either on land or sea any apparatus for wireless telegraphy except under licence from the Postmaster-General. This Act would appear to throw an additional burden on England's neutral duties in time of war, since the Postmaster-General would probably be placed under a duty not to grant any such licences if the licensee intends to use the apparatus for the purpose of assisting or injuring either of the belligerents, for to grant a licence to assist either belligerent would clearly be a breach of neutrality. But, on the other hand, it would not be a breach for England to refrain from prosecuting any offender against the Act, who, by means of an apparatus, were to act in the last-mentioned way, since it is no part of International law that one country shall punish such of its subjects as may commit acts, which if done under its own authority would involve a breach of neutrality. Such punishment can usually be safely left to the injured belligerent.

This account may usefully conclude with the proposition submitted by Sir Edward Fry as being that which ought to be adopted with reference to the use of Wireless Telegraphy, and particularly with regard to such incidents as that of *The Haimun* above referred to, viz.:—"That the sender of wireless telegraphic messages must send them at his own risk, and that any person may lawfully receive and interpret the same, provided that he does so at a place where he may lawfully be."

CHAS. L. NORDON.

IV.—RESPONSIBILITY IN LAW.

(Continued from Vol. XXXI, page 451.)

VII.

IT now remains to apply the principles, embodied in the idea of Responsibility, as they may relate to the individual, to the social order, and to the State; and, in so doing, to direct attention under legal forms to the keeping of good faith, to the redress of wrongs, and to the repression of crime.

We have seen that the springs of action of a responsible being, guided by reason and moral sense (that is, by the strictly human or higher faculties of the mind), are to be found in knowledge exercised by faith: without knowledge and without an abiding faith in the power of knowledge, there is not that "perfect equilibrium of the faculties which is represented by the idea of sanity," and a fully responsible being is one who by reason of the faith that is in him has the power of acting upon knowledge.

It is worth while attempting to realise the true import of knowledge—the ultimate principles on which it rests. In the first place, "our knowledge of things is relative or proportioned to" the thinking mind; and, in the second place, we arrive at it by way of a double process—a perceptible and conscious process, and a latent or sub-conscious process; the one is a process of learning, and the other of reasoning, and by a combination of the two we obtain knowledge and understanding. In the one case, by advance of experience, we have a perception of phenomena—phases of the truth; but, in the other, by aid of reason we conceive reality—the truth itself. Let one beware of narrowing the mind, throwing it out of balance, by too exclusive devotion to one subject: it is on a wide foundation alone that knowledge can be based. By dwelling on one subject, the mind becomes fixed within a certain groove of thought so that

one phase of truth becomes predominant; thus arises the dominance of the fixed idea which, obtruding itself into all the affairs of life, becomes immutably rooted in the mind.¹ Specialism itself is seen to be an evil, if carried to excess: the expert, if too exclusively devoted to one subject, will inevitably develop certain faculties at the expense of others: the lower powers of the intellect may be preternaturally expanded, while the higher powers of the reason may be stunted and depressed. Hence arises a materialistic view of life, whence we get all the fads and fancies for improving the condition of humanity by a backward process, in the insanity of Socialism. Collectivist Socialism is the negation of individual responsibility—except to taxation and to a taskmaster. It is founded on delusion: that, productiveness being constituted by labour, it matters not if the highest intelligence of the country be removed and an inferior intelligence be substituted in the organisation of labour; that the proposition “property is plunder” may be taken as a justification for the confiscation of private property; that property may be confiscated to the State, and the inducements for its production be removed, yet it may suffer no diminution for distribution. Mr. Haldane has said:² “The fundamental proposition of what was called Socialism was the denial of the right of private property whoever put forward these views seemed to him to put them forward with a narrow view of the realities of life. The man was a materialist, and no materialist had ever grasped the meaning of humanity or of the universe.”

It appears, then, that aberration of the intellectual powers is not confined to those who may be properly described as insane; but that men, with intellectual power apparently unimpaired, may so submerge and repress the spiritual part of their being that their views of life never reach reality—in

¹ Myers, *Human Responsibility*, Vol. I, 56, 57.

² Speech at Peebles, reported in *Glasgow Herald*, 6th October, 1906.

the circuit of their mind, there is a dark phase which never sees the light.¹ What it is of importance to observe in this connection is, that the mental equipment of such men is, not that of knowledge and its accompaniment sound judgment; but that they are driven by the nature of the case into narrow lines of thought, so that—should they be accepted by any large following as experts in any branch of learning, say Economics—the results may be disastrous.

We have already seen, that the whole fabric of social order and of the State rests for its stability upon a due sense of the mutual responsibility of its component parts: and, if this be so, the negation of that responsibility would ensure eventually the destruction of the State. Ancient civilisations failed to realise this truth, and they have passed away; modern civilisations are now undergoing the test.

Out of this conception of Responsibility arises a distinction, in the conduct of human affairs, between man's physical or material well-being and his moral or spiritual well-being. In the one case, we shall be guided from the point of view of the psychological basis of responsibility, and, in the other case, from the point of view of its philosophical basis: in the one case, we regard man's social relations mainly from a material standpoint; in the other, from a moral standpoint.

If, in a regard for purely material well-being, the moral and spiritual well-being of the community be lost sight of, one is losing the substance to grasp at the shadow:² in such a case, the political insight of the community must be small indeed and fateful of a decaying State. This consideration becomes most important in the education of children, and in the treatment of those who, having fallen away from right courses, have brought themselves under the Criminal law; and it is most important that the national church, the church of the poor—be it Catholic or Protestant

¹ 1 *Corinthians*, ii, 14; xv, 44.

² *St. Matthew*, ix, 4; xiii, 13—15.

—shall be allowed to carry out its mission in the great cities and to every corner of the land.

We have traced the growth of the fixed idea, and have seen how it may acquire dominance in the mind even of a healthy subject—how easily it may deviate either towards what is reasonable and high-minded, or towards what is unreasonable and destructive; but, before we proceed further in the elucidation of the abnormal, we must first make hasty reference to normal legal relations in the region of contract and of tort.

The primitive idea on which all contractual relations are founded is the exercise of good faith: and we find, in the Archaic forms of contract, that these forms are but the evidences of plighted faith; so we find, in the law of contract of modern times, that, besides evidences of intention and of capacity and legality of the object, the main requisite to the formation of contract is that of good faith and a clear understanding between the parties.¹ Have the parties so pledged themselves one to the other upon the subject-matter of the contract that they have rendered themselves responsible one to the other for duly carrying out the same? Any failure in this good understanding will invalidate the contract—either by way of mistake, misrepresentation, fraud, duress, or undue influence.

Sometimes a question may arise as to the *bonâ fides* of one or other of the parties, and the law may then have to lay down technical rules as tests. One or two illustrations may suffice to show the practical mode of dealing with cases in which the maintenance of good faith may have to be tested.

In contract and in tort, as in other relations of life, a man must be held bound by the consequences of his own acts. In these several relations he incurs certain responsibilities: and we have seen that, as the psychological basis of

¹ Anson's *Law of Contract*, 10th ed., 1903, 11, 140.

responsibility, we are bound by the quality of the attention which we give to our surroundings. In the formation of contract, therefore, we have to look to what is the outward expression of the will of the parties; and, if by reason of carelessness, that will does not meet* in either case with adequate expression, one is in general bound by the outward expression of the intention.¹

A more difficult case arises where the quality of attention may be impaired, not by reason of carelessness, but from mental incapacity of one of the parties. The practical test of *bonâ fides* as laid down by English law in such a case² is apparently that of knowledge of the incapacity by the other party; but it seems also that the incapacity alleged of one of the parties must be such as to render him incapable of understanding what he was about.

A man's rights are limited by corresponding duties towards other members of the State; and the law of tort imposes liability on breaches of duty established by Municipal law. The question in tort is whether the defendant's conduct caused the harm.³ Torts may be divided into three classes:⁴ (1) those in which the tort consists in a breach of duty committed by wrongful means; (2) those in which the tort consists in a breach of duty absolute; and (3) those in which the tort consists in a breach of duty committed by negligence.

It is to the third class of torts alone to which we need direct attention as bearing on the question of responsibility. The element of negligence in tort consists in such conduct as, by "failure*to respond*to judgment or conscience," amounts to a breach of duty and eventuates in damage⁵

¹ Holland's *Jurisprudence*, Ch. VIII, XII, Mistake; *Watkins v. Rymill*, (10 Q. B. D. 178); *Scott v. Littledale* (8 El. & Bl. 815).

² *Imperial Loan Co. v. Stone* (L. R. [1892], 1 Q. B. 599); *Law Quarterly Review*, Vol. XVIII, No. 69, p. 23.

³ *Law of Torts*, Bigelow, 2nd ed., 1903, 44.

⁴ Bigelow, 14, 24.

⁵ *Ibid.*, 307.

—the failure to give that care and skill which it is one's duty to do. Here then we have the psychological element of responsibility, which a man must have, in attention to his surroundings; and the philosophical element of responsibility, which a man must have, in attention to the rights of others.

The apportionment of responsibility in the case of several parties contributory to the act or omission complained of¹ is a question of evidence rather than of principle. When a wrong has been committed, the cause must be looked for in voluntary acts and not in conditions: there can be but one cause, whether that is to be looked for in the acts of one person or of many.

From a consideration of the conditions of responsibility in the acts of a human being in a normal state of mind, we now proceed to consider the like conditions as applied to mental states ranging through various degrees and descriptions of abnormal presentment; and, as in the former case, directing our attention to legal forms in the departments of contract tort and crime, we take up the legal relations of the abnormal in the regions of contract and of tort, leaving for later and separate treatment those relations as they receive illustration in the province of crime.

The deviation from the normal in mental states may be very slight, ranging through various degrees of intensity until it culminates in insanity.² There can, therefore, be no fixed standard of sanity, nor will it be possible to fix on an invariable line of division separating the sane from the insane.³ We must, therefore, look for another test of responsibility than that of sanity for practical service.

¹ *Ibid.*, 368; *Scott v. Shepherd* (2 W. Bl. 892); *The Bernina* (L. R., 12 P. D. 58, C. A.).

² Wood Renton, *Law and Practice in Lunacy*, 14—20.

³ *Mercier, Criminal Responsibility*, 225; *Jenkins v. Morris* (L. R. [1880], 14 Ch. D. 674).

The fundamental notion of Responsibility, involving duty and moral obligation, is a complex of three ideas—in the possession of a capacity for knowing for choosing and for acting—representing the triple functions of the mind. If any one or other of these functions suffer weakness or impair, there is so far a lack of those qualities which constitute a responsible being. There are, accordingly, degrees of responsibility even as there are degrees of deviation from the normal.¹ In social and political relations, we see this fact exemplified in the case of public opinion refusing to attach responsibility to the teachings of those whose minds are unevenly balanced.

Sanity then, in the ordinary affairs of life, is the capacity to conform in conduct to the ordinary human standards of reasonableness and self-control. The standards of conduct are such as are observed habitually by the ordinary man; and, in the last resort and in any particular case, are such as will commend themselves to a judge or jury after evidence led. We are thrown back, therefore, on the necessity for an elaboration of practical rules which will guide the Courts in setting up standards of right conduct for application in particular cases. We find, in the history of the development of English law, that, starting with the maxim of the civil law *furiosus autem stipulari non potest*, sets of rules as to the contractual and testamentary capacity and criminal responsibility of lunatics were being evolved in which “there is a steady approximation towards the only uniform test of lunacy which is desirable or possible, viz., ‘Was the person whose act is in question able to understand its nature, and to pass a fairly rational judgment on its consequences to himself and others; and, was he a free agent so far as that act was concerned?’”²

In the case of Contract,³ the course of development is

¹ Mercier, *Crim. Resp.*, 149, 181.

² Wood Renton, *Law and Practice in Lunacy*, 7, 8.

³ *Ibid.*, 8—16.

exceedingly interesting and instructive—rule and exception following one upon another until a right principle is arrived at. The old rule of the Roman law “is confronted by the no less famous maxim,” that no man should be allowed to stultify himself by setting up his own incapacity.¹ This in its turn suffers abatement: and, between the two, the principle is coming to be perceived that, in dealing with the contract (and consequently with any other juristic act) of a lunatic, we should apply the like methods of testing its validity to those that are applied in the case of ordinary persons—was the contract entered into in good faith, was the party chargeable capable of giving his consent in the absence of fraud, mistake or other undue influence?²

From the year 1827 onwards, we observe the elucidation of a new theory. In *Pitt v. Smith*,³ the agreement of a person in a state of complete intoxication was set aside on the grounds that “he had not an agreeing mind:” and, in a note on this case, “writers on the law of Scotland” are referred to as expressing a similar doctrine—“‘Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige themselves,—but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract.’”⁴ In *Brown v. Jodrell*,⁵ on an assumpsit for work and labour, the defence of insanity was set up; and Lord Tenterden, C.J., said: “I think that this defence cannot be allowed, and that no person can be suffered to stultify himself and to set up his own lunacy as a defence. If indeed it can be shown that the defendant has been imposed upon by the plaintiff, in consequence of his mental imbecility, it might be otherwise, and such a defence might be admitted.” In *Moulton v. Camroux*,⁶ the principle of good faith and bond

¹ Wood Renton, *Law and Practice in Lunacy*, 7, 8.

² *Ibid.*, 10—20.

³ 1811, 3 Camp. 33.

⁴ Erskine, *Inst.*, 814-5.

⁵ 1827, 3 Car. and Payne, 30.

⁶ L. R. [1846], 2 Ex. 487; L. R. [1849], 4 Ex. 17-9.

fide dealing as the essential test of all contract, is advanced in clearness; and it is declared that, even if a man "was so lunatic or drunk as not to know what he was about, the modern cases show that, when that state of mind was unknown to the other contracting party and no advantage was taken of the lunatic, the defence cannot prevail—especially where the contract was not merely executory but executed in whole or in part and the parties cannot be restored altogether to their original position." In *Matthews v. Baxter*¹ the case of *Gore v. Gibson*² is reviewed. In the latter case, the contract of one "in such a state of drunkenness that he did not know what he was doing," when it appeared that the other contracting party knew it, was declared void altogether; but, in the former case, reviewing the language of the judges in *Gore v. Gibson*, the Court decided that the contract of a drunken man was voidable only and not void. In the case of the *Imperial Loan Coy. v. Stone*,³ the development of that department of law, which deals with the contractual capacity of lunatics, has reached its furthest point.⁴ Shortly stated, its effect is to sweep away the tentative distinctions by means of which the judges felt their way towards the illuminating principle of good faith as the essential quality of all contract: it came to be perceived that, in the observance of good faith, the law had provided a test of free agency which might be applied in all cases. In that case, the Court held that "a defendant who seeks to avoid a contract on the ground of his insanity must . . . prove not merely his incapacity, but also the plaintiff's knowledge of that fact":⁵ and that he must "prove further that the person with whom he contracted knew him to be so insane as not to be capable of

¹ L. R. [1873], 8 Ex. 132.

² 1845, 13 M. and W. 623.

³ L. R. [1892], 1 Q. B. 599.

⁴ Wood Renton, *Law and Practice in Lunacy*, 12.

⁵ *Imperial Loan Coy. v. Stone* (L. R. [1892], 1 Q. B. 603); Judgment of Lopes, L.J.

understanding what he was about," otherwise, "the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it."¹ In the same case, occasion² was taken to show what the law had been and how in modern times it came to be relaxed. Setting aside the maxim of the Civil law, which presents insanity under a stereotyped form, the law of England of very old date³ laid down that "no man of full age shall be received in any plea by the law to stultify and disable his own person;" yet, "in certain cases the Crown, and in other cases persons who claimed under one who was *non compos mentis*, could set up the disability, although the man himself could not," so, in *Moulton v. Camroux*⁴ it came to be affirmed that "unsoundness of mind would now be a good defence to an action upon a contract if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it. It thus appears that there has been grafted on the old rule the exception that the contracts of a person who is *non compos mentis* may be avoided, when his condition can be shown to have been known to the plaintiff." Thus at length we arrive at a clear perception of the fact that, in all essential particulars, the contract of a person not of sound mind may have its validity tested by an application of the same rules which govern the law of contract in general.

In a recent case,⁵ tried before the Judicial Committee of the Privy Council on appeal from the Supreme Court of Natal, we have a striking instance of the advance made by the law of England, in lunacy cases, over the law of a country (such as that of Natal in South Eastern Africa), which founds itself on the Roman law, where it is declared

¹ *Ibid.*, 601; Judgment of Lord Esher, M.R.

² *Ibid.*, 601-602; Judgment of Fry, L.J.

³ *Beuerley's Case*; 4 Co. Rep., 1236.

⁴ L. R. [1848], 2 Ex. 487.

⁵ *Molyneux v. Natal Land and Colonization Coy. Ltd.* (L. R. [1905], A. C., 555).

"that the Roman-Dutch law is not silent upon the question whether a contract made by an insane person is voidable only, for the authorities expressly say that it is absolutely void,² . . . and in any case" the defendant's "ignorance of the fact" that the plaintiff was not in a fit mental condition for carrying on business of any kind, "cannot confer validity on an instrument which was otherwise invalid."³ Another case,⁴ referred to by Sir Henry de Villiers in his judgment from which quotation has just been made, was an application to the Privy Council for leave to appeal from a decision of the High Court of Australia, where a power of attorney given to his wife by a husband while of unsound mind was pronounced invalid. The Privy Council refused leave to appeal mainly on grounds of public policy, but further on the ground of seeing "no reason to doubt that the judgment of the High Court is right." The decision of the High Court of Australia seemed to turn on the fact that the wife of the plaintiff knew her husband to be of unsound mind at the date on which he granted to her the power of attorney, that consequently (it was said) the power was void and the deed of transfer upon which the defendant acted was a nullity. In such a state of the facts, the Court seems to have gone back to an old case⁴ as an authority for declaring that the juristic act of a person *non compos* is void *ab initio*.

The growth of the modern doctrine, regarding the capacity of the insane to marry, need not be followed out; as in the case of ordinary contracts and in that of testamentary capacity, the same leading features are shown before the final result is arrived at. The pseudo-metaphysical doctrine, of the indivisibility of the mental faculties, which controlled the decisions for a time, was finally set aside in the case of

¹ *Ibid.*, 562-3.

² *Ibid.*, 564, 569.

³ *Daily Telegraph Coy. v. Mr. Laughlin* (L. R. [1904], A. C. 776-7, 779-80).

⁴ *Thomson v. Leach* (1690, 3 Mod. Rep. 301).

Durham v. Durham,¹ and the importance of the cases which follow turns mainly on the question of undue influence as affecting the contract and status of marriage.²

In the development of the law, respecting the testamentary capacity of the insane, there are some points which deserve notice.³ In the year 1870, by a judgment of the Court of Queen's Bench, in the case of *Banks v. Goodfellow*,⁴ the law was settled upon its modern basis, the metaphysical theory enunciated by Lord Brougham in *Waring v. Waring*⁵ was discredited, and it may be said that the rules governing the testamentary capacity of the insane were assimilated to those which prevail in the case of contract. The American law, it has been remarked,⁶ has undergone a similar process of development, and a rule almost identical as to testamentary capacity to that in England may be observed in the laws of some of the American States. In Scotch law, the great case on testamentary capacity is that of *Morrison v. Maclean's Trustees*,⁷ where the test of capacity as applied to the degree of insanity has regard to the nature of the act and the kind of mental exertion required for it. The consideration of cases in Scots law will be reverted to when we come to deal more particularly with the rules pertaining to criminal responsibility.

There seems to be some doubt as to the rules which ought to govern the civil responsibility of the insane on the commission of tort. "There can be no doubt that the mere existence of unsoundness of mind does not destroy civil capacity any more than it destroys criminal responsibility."⁸ The authorities, so far as they go, seem to waver between a rule which would place a criminal and a civilly culpable act in this respect upon the same footing, and a rule which

¹ 1885, 10 P. D. 32.

² Wood Renton, 19—26.

³ *Ibid.*, 32—63.

⁴ L. R. [1870], 5 Q. B. 549.

⁵ 1848, 6 Moo. P. C. 341.

⁶ Wood Renton, 41—4.

⁷ 1862, 24 Dunlop's Rep. 625.

⁸ Wood Renton, 64—5.

would give no relief from an action of tort even to one suffering from total mental incapacity. We have a dictum expressive of the former view by the Master of the Rolls, in a decision of the Court of Appeal in 1897;¹ but the dictum remains apparently unsupported by further authority. The more correct view appears to be that lunacy shall be no excuse in an action of trespass, "which tends only to give damages according to hurt or loss,"² unless indeed there be such sufficient excuse as the law gives effect to in ordinary cases. We thus reach the like principle to that which we have seen evolved in the historical development of the law of contract; and we are able to state in general terms that a lunatic may be held liable in an action of tort, in like manner as a person of sound mind, unless he can show such ground of exemption from civil liability for the act in question as the law in general will allow.

RANKINE WILSON.

(*To be continued.*)

V.—CURRENT NOTES ON INTERNATIONAL LAW.

Ancient Rules and Modern Conditions.

IT is sometimes urged that in view of the changed conditions of modern commerce, and the rapid transit which railways provide, the ancient rules should be relaxed which require the terminus of a contraband adventure to be a belligerent port, and the terminus of an "occasional" contraband voyage to be a military or naval port. Accordingly, the latter of these rules was disregarded in the *Calchas* case, with unedifying results. But now we have expert

¹ *Hanbury v. Hanbury* (8 Times L. R. 559).

² Wood Renton, 64-5; *Law Quarterly Review*, Vol. XVIII, No. 69, p. 30, note by the Editor.

assurance that the conditions of commerce have not so greatly changed after all. The rules alluded to were established with full knowledge of the benefits afforded by canals; and we learn from evidence laid before the Royal Commission on Canals and Waterways that canals are serious rivals to railways. Mr. Sauer (Engineer of the Weaver Navigation) is responsible for the statement that "canal traffic is not appreciably slower than railway traffic." The time for the delivery of parcels to Cheshire by rail is put at four or five days, which compares with three days by the old canal fly-boats.

It was, indeed, in relation to the Netherlands, which are, of course, nothing but a network of canals, that Lord Stowell laid down the rules alluded to. They provide the simple tests of (1) belligerent port of discharge, and (2) belligerent naval port of discharge, in order to fix a cargo with the character of contraband in the case of dangerous and ordinary goods respectively. It seems premature, to say the least of it, to abandon these settled rules on the strength of what now appears to be a pure hypothesis.

In the *Calchas* case, it will be remembered that a cargo of cotton was held in Russia to be confiscable as contraband on account of its destination to a great commercial port (Kobe), simply because there happened to be an ammunition factory at Osaka, ten or twelve miles away from that place. Such a decision would have been impossible under Lord Stowell's principles. The neighbourhood of the factory might have had some bearing on the question of whether the cotton was not really the property of the Japanese government, but not otherwise. Even on the determination of that question, it could have only a minor influence. One can hardly imagine the British Court of Admiralty calling for further proof of the ownership of so innocent an article as cotton, merely because of the fact that some facilities did

exist for converting it into an explosive upon delivery. Still less can one imagine its condemning it as enemy property out of hand on that slender basis. At the same time circumstances may often be such as to raise a violent presumption of goods being the property of an enemy government, although they may not be so strong as the fact of destination to an enemy naval port. In such cases, it is undoubtedly hard that the Declaration of Paris now prevents their seizure. But to compass their seizure by a sweeping extension of the definition of contraband so as to include ordinary cargoes going to ordinary ports, is to go far beyond the pretensions which that Declaration was intended to abate. Ancient belligerents would never—(save in their wilder orgies of reprisals)—have confiscated the *Calchas'* cotton as enemy's property: it is strange if their modern successors, formally barred from doing so, should go beyond what their ancestors would have ventured, and seize it under the misapplied name of contraband.

Proper Law of a Contract.

By what law is a promise to marry to be interpreted, when it is received by a Dane in Denmark, but despatched by a domiciled Englishman from England and written in the English language? Adopting the test of the intention of the parties, Bray, J., in *Hansen v. Dixon* (*Times*, Nov. 10th, 1906) has decided that the law of England is applicable. It has frequently been pointed out that the test of intention has only been applied in practice to those cases in which the result of applying it has been to uphold transactions: and *Hansen v. Dixon* is no exception to the rule. The test is an unfortunate one, because the lawfulness of the intention may itself be the very matter which is in dispute.¹ And *Hansen v. Dixon*, at any rate, may well be

¹ See *Law Magazine and Review*, Aug. 1906, 341.

explained on the classic ground that the personal law of the defendant (the domiciled Englishman) recognised his liability, though the Danish law was said not to do so.

The further point was taken by the plaintiff, that the Danish law refusing a remedy in most cases of breach of promise to marry was adjective law only. Bray, J., thought this point good also; and therefore that even if Danish law were properly applicable, that law did recognise the plaintiff's right, though it gave her no remedy by action. In that case the English law, as *lex fori*, supplied the remedy as a mere matter of procedure. We shall look with interest for the re-appearance of this case in the Court of Appeal. It goes far to show how very imperfect a guide the presumed intention of the parties is, and suggests strongly that law must be regarded as something entirely independent of, and above, their personal wishes.

Two rational courses lie before a tribunal which has to decide a question into which foreign elements enter:—to select an appropriate law to govern its decision, or to apply its own. What is not rational is to do the one under cover of doing the other.

English law concedes a very wide freedom of contract. Short of contracting to infringe the law, or to contravene established morality, or to restrain trade, people are at liberty to bind themselves by legal sanctions to any promise whatever. Amongst other binding agreements, they may agree that their contracts, or some particular contract of theirs, shall be interpreted as governed by a reference to some foreign law—and this term in a contract will be as good as any other. The meaning and effect of the contract will be different from what they would have been if it had contained no such term. But the altered meaning and effect will be accepted as the meaning of the parties, just as if they had not named the foreign law, but had set out

its effect in full in their agreement. Naturally, the contract so interpreted will always be subject to English law in the last resort: thus, if it would now involve a promise to break the law of England, or to infringe English morals, it would not be enforced. This is not a case of the English Court's refusing to enforce a foreign contract because of its inconsistency with the *ordre public* of England. It is the simple case of the ordinary rule of English law, applied to a somewhat abnormal English contract, in which foreign terms are expressed or implied. Such a reference can be made implicitly, and has been implied on very slender grounds. But there is a danger that our Courts may mistake this English principle of unlimited freedom to adopt foreign legal rules, and of unlimited liability to have it presumed that one meant to adopt them, for a kind of essential element in contract, applicable *jure gentium* wherever a contract is met with, and whatever its proper law. The view expressed in *Hamlyn v. Talisker Distillery*,¹ and applied, with a certain absence of discrimination, in *Robertson v. Brandes, Schönwald & Co.*,² and *Hansen v. Dixon*, to the effect that the intention of the parties must supply the law by which a contract is to be interpreted and applied, is nothing more nor less than the expression of an opinion that every contract is properly governed by the ordinary rules of English and Scottish law—wherever it was made, wherever its parties were domiciled, and wherever its subject-matter was situate, or its terms were to be performed. True, in many cases a foreign law will thus be brought in by implication. But in this lies the chief danger of the unscientific procedure in question. The implication may proceed in the most capricious way. Once the rule is accepted that the intention of the parties has an inherent validity, transcending the limits of all national laws, it has

¹ L. R. [1904], A. C., 202.

² 8 Fraser, 815. And see Minor's *Conflict of Laws*, sect. 363, and cases there cited.

to be anxiously searched for, and is readily implied on very trivial indications indeed. Courts will inevitably differ widely as to the precise value to be attached to small circumstances. The desire to uphold transactions—*ut res magis valeat quam pereat*—will induce them to imply a reference to that law which will make them valid. The leaning towards their own law, which they understand best, may also have its unsuspected force. The plain rules, establishing the *lex loci celebrationis*, the *lex loci solutionis*, or the like, were meant to obviate all such confusion and uncertainty. When a contract involves foreign elements, it can hardly be right to insist upon applying what is virtually our own law implying a choice of laws on slight and uncertain grounds, instead of consistently applying one of the recognised tests.

In the present case, looking carefully for an “intention,” Bray, J., found that the defendant made it an implied term of his offer that it should be governed by English law. But this leaves entirely out of sight the prime question for decision. For, if Danish law were the “proper law” of the contract, it might very well be that according to its rules no such term could be enforced, and no such implication made.

Robertson v. Brandes, Schönwald & Co.

The judgments in this case are now before us (8 *Fraser*, 815), and they throw little light on the above question. Lord Salvesen's is the only one which deals with *Hamlyn* in any detail. His Lordship appears to have thought that the lords in *Hamlyn* treated the contract as capable of being split up into a variety of stipulations, some to be governed by Scots and some by English law. This is an attitude which we contemplated in the August number of this Magazine (p. 472) as an utterly improbable one. Logically,

it certainly follows that if there is no supreme law governing the entire contract, but all depends on the intention of the parties, there is no reason why that intention should not fluctuate from clause to clause, and parts of the agreement be referable to the law of Chili and others to the law of China. But this is really a *reductio ad absurdum*, and indicates that something other than the intention must be the test by which that intention is to be judged. This ingenious suggestion of Lord Salvesen's is a possible way of explaining away *Hamlyn*; because there, the proper law must have been Scottish or English, and in either case it conceded liberty to pick out special laws for special clauses. But it does not quite explain *Hamlyn*. For it is plain that no such splitting up of the contract was in the minds of the lords who spoke. They were not consciously picking a clause out of a Scottish contract, and deciding that the parties had agreed that that particular stipulation should be governed by the law of England—as the law of Scotland allowed them to do. They simply decided that, in a case of some ambiguity and difficulty, the existence of this particular clause showed that the parties' intention was not to make a Scottish contract at all. There is no trace of the contract being regarded as anything but a whole.

We have always regretted *Hamlyn v. The Talisker Distillery*; not so much for what it decided, as for the unsatisfactory way in which such great authorities as Lord Herschell and Lord Watson evaded the difficulties of laying down a clear rule on the subject, by referring the matter to the parties' intention. So specious a rule, commended by the authority of these eminent names, now obtains an undeserved currency, and will continue to do so until something occurs to show its inherent defects. Probably the Courts will endeavour to escape from the necessity of applying foreign law in accordance with the intention of the parties, in cases where the

result would be to allow them virtually to evade the law of this country, by invoking the principle of public policy. But this is, in effect, to apply English law in all cases, which cannot be a sound position. Or, if the principle of public policy were invoked in the more glaring cases only, the result would be that no fixed principle of decision would be discoverable at all—a still more regrettable conclusion.

Pacific Penetration.

The difficulty which has arisen between Japan and the United States of North America brings up for discussion two questions of capital importance:—

(1) What are the limits of the rights which must be conceded by a State to foreigners actually within its territory?

(2) To what extent is a State excused from its duties by the fact that the organ charged with its foreign relations has no adequate executive powers?

The Treaty of Washington, 1894, is one of the celebrated group of treaties negotiated by Japan which supervened upon the war with China. Their terms varied very little, even in verbal details, and they were evidently based upon the standard form of commercial treaties with the most favoured nation clause. In their earlier form, such treaties regarded commerce exclusively. Liberty of residence and litigation was conceded as ancillary to liberty of trade, in fact if not always in form. Modern times, with their increased facilities for living abroad, have made it necessary to provide for others than traders. The treaties of 1894 do so in broad but by no means all-comprehensive terms:—

“I. The citizens or subjects of each of the two High Contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property. They shall have free access to the Courts of justice in pursuit and defence of their rights;

they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates, and representatives, to pursue and defend their rights before such Courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens and subjects. In whatever relates to rights of residence and travel, to the possession of goods and effects of any kind, to the succession to personal estate by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens and subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights [as], and shall be subject to no higher imposts or charges in these respects than, native citizens or subjects, or citizens or subjects of the most favoured nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

“They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects or subjects or citizens of the most favoured nation. The citizens or subjects of either of the contracting Powers residing in the territories of the other shall be exempted from all compulsory military service whatsoever, whether in the army, navy, national guard or militia: from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions.”

It is fairly plain what is the object of treaties of this kind. In conceding “full liberty to reside in any part” of its

territories, a nation does not mean that foreigners are to be free to force their way into any part of its territorial area, in defiance of private right. They merely undertake to put no forcible obstacle themselves in the way of foreigners who may wish to reside in, and travel through, the country in ways which would be lawful for natives. They must also be taken to guarantee that no such obstacle shall be raised by subordinate public, as distinguished from private, authorities.

It does not seem that the words of the treaty give Japan any substantial ground of complaint. Mr. Hyde (Chicago), in the *Green Bag*, sets out the contention of those who argue that the right of residence includes the right of schooling. We can only say of this argument (which Mr. Hyde neither approves nor condemns) that it is worthy of Hautefeuille at his worst. Can it fairly be said that the right to use the State schools "relates to "rights of residence and travel, to the possession of goods "and effects of any kind, to the succession to personal "estate and the disposal of property?" It does not appear to do so in any way. A very similar question was raised in 1901, when the Imperial consul at San Francisco objected to a circular issued by the port sanitary authorities, imposing special restrictions on Japanese as a precaution against plague. The Japanese impugned it as a discrimination contrary to their treaty, whilst its framers upheld it as a discrimination based on a definite hygienic ground and not against Japanese as such. However, there were the definite words of the treaty conceding liberty of entry in the fullest manner. Here, there is no such precise language. It seems to be fancied that all discrimination is forbidden by the treaty: but this appears to be a pure assumption, unwarranted by its terms. And in fact, this matter of resort to the public schools is one going far beyond the mere affairs of residence, litigation,

liberty of person and of conscience. These things a government may well promise not to interfere with: it is to go much further to ask to be admitted to its schools. And when they are not even its own schools, but its subordinate State's schools, it is an extremely unlikely thing that it can have meant to deprive that State of the right of saying who shall be taught in them.

The case must therefore rest on the Common law of nations that their subjects, if admitted to a foreign territory at all, must be treated with a certain amount of consideration. This branch of International law has never been adequately worked out. Most writers are content with saying that foreigners must not be compelled to fight, and must not be treated oppressively. This is to be understood as meaning that no violent or serious interference with the persons and property of foreigners as such must be committed: not that they may not be subject to special regulations and even to special taxation.

According to Phillimore (II, sect. 3), the State to which a foreigner belongs is entitled to interfere "when he has received positive maltreatment or when he has been denied ordinary justice in the Courts of the country." This is confirmed by a reference to the celebrated memorial drawn up in reply to the King of Prussia, in 1753. "The Law of Nations, founded upon justice, equity, convenience, and reason of the thing, does not allow of reprisals, except in cases of violent injuries directed or supported by the State; and justice absolutely denied. . . ."

It must be concluded that no infringement of Japanese rights, contractual or real, can be said to have been committed. Were it otherwise, the United States would undoubtedly be responsible in damages if they possessed no power to fulfil their international duties in the territory of California. Japan knows nothing of California but as a geographical expression. Forty years ago California made

it impossible that Virginia and her allies should thenceforward even seem to be sovereign States. The arbitrament of a civil war cannot be set aside.

The Newfoundland Agreement.

The United States are unfortunate enough to be concerned at the moment in another demonstration of the operation of constitutional difficulties on International law. In this instance, they are the complainants; Great Britain and Newfoundland take the places of the United States and California. The rights of the United States on the colonial coast have always been a subject of uncertainty. The Peace of Paris secured them in large measure. But did it secure them as "real" rights, like the independence or the territory of the States: or was it merely that Britain promised to permit their exercise? In the latter case, of course, she was absolutely released from her promise by the outbreak of unfriendly relations in 1812-14. Nothing was said about these privileges when peace was concluded: and, as in the case of the Pertendic claims, where a similar liberty of resort to the French Ivory Coast was reserved to Britain by the Treaty of Utrecht, a prolonged diplomatic conflict arose. Successive conventions of 1818, 1854 (the well-known "Reciprocity" treaty), and 1871, dealt with the matter from time to time. But the last was abrogated in 1885 by notice given two years previously, and since then the two countries have been carrying on the fishery by periodical temporary agreements. It seems almost certain that the treaty of 1818 remains in force, as those of 1854 and 1871 only purported to confer "additional" benefits. The treaty of 1818 applied only to certain limited districts of Newfoundland and Labrador, but it is precisely these with regard to which the difficulty exists. Within those limits, it appears that the United States have a

right of fishery, with a right of landing for certain purposes in unsettled districts. Colonial Acts penalizing the engagement of crews and the supply of bait appear, nevertheless, to be perfectly regular. For the commercial treaty of 1815 between Great Britain and the United States is expressly limited to the British dominions in Europe, and the supply of bait and crews is nowhere stipulated for in the treaty of 1818. It was a different matter, when, in 1878, the Fortune Bay fishermen attacked the United States crews who had used seines and shot nets on Sunday, which the local law precluded themselves from doing. In that case, compensation was paid by Great Britain; though Lord Salisbury took occasion to dispute the view put forward by Mr. Evarts, that these rights were "real" rights, and that the manner and mode of their exercise not only should not, but could not, be controlled by the local law.

Another instance of the difficulties of a colonial Power is afforded by the objections now put on record by the authorities of Australia and New Zealand to the New Hebrides Convention. But the *London Morning Post* is obviously right when it says that:—"If these colonies expect Great Britain to consider their interests and to consult them, it is at least reasonable that they in turn should consider Great Britain's position, and the necessity laid upon her of dealing in a large way with the great Powers who are her next neighbours." Newfoundland obtains advantages from the Imperial connection for which the recognition of Imperial treaties is not an excessive payment.

Norway and Sweden.

The important question has been little discussed of the bearing of recent events in Scandinavia on the British and French guarantee of the integrity and independence of the kingdom of Sweden and Norway. This guarantee was

effected by treaty in 1855, as a consequence of the Crimean War. The guarantee of a kingdom cannot become invalidated merely because the State in question receives an increase, or sustains a diminution of territory. The political entity subsists unchanged. It is entitled to the benefits of its engagements, and is bound by their obligation, except so far as performance is excused by *vis major*. Was the United Kingdom of Sweden and Norway then, in 1855, one kingdom or two? It can hardly be doubted that, so far as international recognition was concerned, it was a single composite kingdom, with one Foreign Office, one Court, one set of diplomatic representatives. That each kingdom was municipally regarded as a sovereign State does not affect the position. So are the various States of the North American Union. Yet no one considers them to be internationally sovereign. The one salient feature which might suggest to foreigners that there existed an independent Norwegian kingdom was the Norwegian flag, which was even flown on Navy ships. We cannot think that this is enough. Two provinces of the same country may well have different colours. At this moment Canadian ships, even in Government service, wear a different ensign from those of Britain.

The true solution would appear to be that Norway is a new State, so far as International law is concerned. She has no treaties with foreign Powers, except such as she may have recently negotiated. She is not entitled to the benefits of the Franco-British guarantee, whilst Sweden, as representing the former dual monarchy, is not affected by the loss of the Norse territory, excepting so far forth as that loss alters the area of the territory which is guaranteed. As to other treaties, the Swedish government has repudiated (30th October, 1905) liability under them in cases in which they were entered into with reference to Norway, which is only another aspect of the same principle. We do not know

that, by a voluntary separation, a State could throw the obligation of carrying out a part of its treaties on to a comparatively small part of its territories. Each division must succeed *in solidum* to the obligations of the whole. But here the division was not voluntary. Norway, on its part, is committed to the theory of its continuous separate existence. It has therefore accepted responsibility for treaties concluded by the old monarchy in which Norway was expressly named as a party. At least, this is the inference from the note accepting liabilities "resulting from " international conventions, concluded between Norway and " one or more foreign States, either in common with Sweden, " or alone, or as a party adhering " (30th November, 1905). Norway cannot, however, expect other countries to fulfil in her favour obligations which were entered into with the united kingdom. Her theory is that she was a partner: their reply must be that they knew of no partners. Morally, her contention may be justified; but foreign nations must be relieved from the necessity of adjudicating upon delicate questions of internal and constitutional law. They contracted with one kingdom; they are not bound to performance in favour of two.

T. BATY.

VI.—NOTES ON RECENT CASES (ENGLISH).

YEARs ago Sir Frederick Pollock expressed the hope that the decision in *Osborn v. Gillett* (L. R. [1873], 8 Ex. 88) might some day be reconsidered by the Court of Appeal. Unhappily that day has not arrived, and in the meantime, on the strength of that case, it has again been held in the almost parallel one of *Clark v. London General Omnibus Co.* (L. R. [1906], 2 K. B. 648; 75 L. J. R., K. B. 907), that there is no right in the father of an unmarried child killed by the negligence of a third person, to recover funeral

expenses so cast upon him by the wrong-doer. Such a doctrine being an anomalous exception to the clear rule that when a plaintiff has sustained a damage from the wrongful act of a defendant, the defendant is responsible, should for its support "show a clear and binding authority either by express decision or a long course of uniform opinion deliberately formed and expressed by English lawyers and experts in English law." These are Lord Bramwell's words, in his dissenting judgment in *Osborn v. Gillett*; and he adds, "I find neither." "There is no semblance of authority on this side of the Atlantic." In fact, the doctrine is sustained merely by two or three cases adversely criticised by Lord Bramwell, and, for what it may be worth, the preamble to Lord Campbell's Act. The better opinion and the force of the reasoning seem to be adverse to the decisions, and it will be a pity if the case does not go up to the House of Lords.

Although in *Lowe v. Dorling and Son* (L. R. [1906], 2 K. B. 772; 75 L. J. R., K. B. 1019; 95 L. T. R. 243), the majority of the Court had the misfortune to have the opinion of the Master of the Rolls opposed to them, the sounder reasoning seems to be contained in their judgment, that a bailiff is to be liable to an action if he proceeds with a distress on the goods of a lodger who has served him with the declaration and inventory as required by the Lodgers' Protection Act 1871, and has tendered any rent that he may owe. The words of the second section, "and the superior landlord shall *also* be liable to an action at law at the suit of the tenant," must therefore be taken to mean, not that the superior landlord shall alone be liable, but that the liability shall attach severally to all the persons named in the section, viz.: "the superior landlord, the bailiff or other person employed by him," and that the aggrieved lodger shall have the right of choosing whether he will proceed

against the bailiff or against the landlord. As the lodger is always in an unfortunate position, it is well that every motive of precaution should be impressed upon the persons enforcing the landlord's right, especially as there is the *primâ facie* presumption that the lodger is acting with veracity, inasmuch as if his declaration and inventory are untrue in any material particular he will be deemed guilty of a misdemeanour.

The judgment of Jelf, J., in *French v. Howie and Wife*, noted in Vol. XXXI, No. 338, p. 98, in dissenting from his colleagues, when the case was before the Divisional Court, has prevailed with the Court of Appeal (L. R. [1906], 2 K. B. 674; 75 L. J. R., K. B. 980; 95 L. T. R. 274), and the extraordinary convolution produced by the decision appealed against, which in effect was that two persons could be severally liable for an undivided debt which is not a joint one, has been resolved by the Court reverting to the principle settled in *Morel Bros. v. Westmoreland*, and holding that the plaintiff could not, after having elected to treat the wife as liable for the whole debt, afterwards make out a second liability against the husband.

From the special efficacy which the law in past times attached to a document authenticated by a seal, and from the tradition which has preserved the existence of the form, though with diminished vitality, down to to-day, there seems to be a popular belief that a piece of wax, or the modern substitute of a wafer or the impression of a die, imparts to any instrument an assurance which is almost unimpeachable. And some judicial decisions have, with modifications, done much to preserve this faith. *Shaw v. Port Philip Gold Mining Co.* (13 Q. B. D. 103) was one of these. The first decision in *Ruben v. Great Fingall Consolidated*, noted in Vol. XXIX, No. 333, p. 484, was another, holding as it

did that a share certificate with a genuine seal fraudulently applied by an officer whose function it was to issue genuine certificates of that nature, was binding on his employers. This was reversed in the Court of Appeal, as noted in Vol. XXX, No. 334, p. 95; and the reversal has now been confirmed by the House of Lords (L. R. [1906], A. C. 439; 75 L. J. R., K. B. 843; 95 L. T. R. 214). The emphatic judgment of Lord Davy is conclusive. He points out that the man whose name was used as transferor had no shares to transfer; his name to the transfer was forged; the seal was fraudulently placed on the certificate, and the signatures of two directors of the company to that instrument were also forgeries. The appellant's claim was, as his lordship said, "as full of holes as a colander."

Goldsmiths' Company v. Wyatt, noted in Vol. XXXI, No. 330, p. 225, has been appealed against, and the Court has (L. R. [1907], 1 K. B. 95), discharged the judgment of Channell, J., which held that gold and silver cases of complete watches imported from abroad were not liable to be assayed and stamped, as all such cases of watches made in the United Kingdom have to be. Though the decision is destructive of established notions and customs, and will necessitate considerable re-organisation in the trade, it must be admitted that the reasoning of Farwell, L.J., is convincing. Moreover, it seems that the word "plate" as used in Acts of Parliament, includes a gold or silver watch case, and the case can hardly cease to be "plate" because works are placed in it. As the Goldsmiths' Company, who are the great practical authorities in such matters, have, by never availing themselves of the Customs Act of 1842, apparently been satisfied all these years that such cases to finished foreign watches were not plate, it was sought to apply the principle of *contemporanea expositio*; but it seems to be the adopted opinion that a statute must be "a century or two" old for the rule to be applied.

T. J. B.

Hard cases make bad law, and consequently bad lawyers. This is made painfully evident by *Cavalier v. Pope* (L. R. [1906], A. C. 428). There a house was let by the respondent to the appellant's husband. At the time it was let it was, to the knowledge both of the appellant and her husband, in a dilapidated condition, and the respondent, by his agent, promised at some future time to put it in repair. He failed to do so, and in consequence the appellant sustained severe personal injuries. The appellant and her husband sued the respondent, and the jury gave the husband £25 and the appellant £75 damages. Now nothing could be clearer than that the verdict for the appellant could not stand. The respondent was under no contractual duty to the appellant. His contract was with, and his promise to repair was to the tenant, her husband. The appellant was in law simply a person who lawfully went into the house well knowing it was dangerous, and was injured in consequence. Yet Phillimore, J., entered the verdict for the appellant, and when the respondent appealed, Mathew, L.J., delivered a very able judgment endeavouring to sustain it. The Master of the Rolls and Romer, L.J., however, set the verdict aside, and the House of Lords, on further appeal, unanimously sustained their decision.

An interesting point of difference between the practice as to injunctions in England and Scotland, arose in *Alexander Pirie & Sons, Ltd., v. Lord Kintore* (L. R. [1906], A. C. 478). It is well known that when the Court of Chancery issues an injunction it simply declares the rights of the plaintiff, and forbids the defendant from doing anything contrary to them. This leaves the defendant liberty to do as he likes provided he does not interfere with the rights so declared. But when the Scottish Courts issue an interdict they specifically set out in it the acts which the defendant is prohibited from doing. This course seems far from being

as satisfactory as our own, since some of the acts prohibited* might conceivably sometimes be done in such a way as not to injure the plaintiffs' rights, and other acts not prohibited might be so done as to inflict injury upon them. In the case above cited this difficulty was attempted to be got over by giving the parties leave to apply to the Court, if there took place any substantial change in the subject-matter of the action affecting the rights of the parties.

We have often had occasion to note the uncertainty introduced into the law regulating the administration of assets by recent or comparatively recent legislation and the varying interpretation which the Courts have from time to time put upon it. The latest example of this is *In re Sampson, Robbins v. Alexander* (L. R. [1906], 2 Ch. 584). That case dealt with the executor's right to prefer one debt to another. Hinde Palmer's Act 1869 was passed with the object of abolishing the old priority of specialty over simple contract debts, and in *In re Williams' Estate* (L. R. 15 Eq. 270), Wickens, V.C., was bold enough to suggest that it did so. Soon, however, doubts arose on the subject. And at last, in *In re Hankey, Cunliffe & Smith v. Hankey* (L. R. [1899], 1 Ch. 541), North, J., held that the priority still existed so far as to prevent an executor paying simple contract debts in priority to specialty debts of which he had notice. The practice that was followed when the assets were insufficient to pay all debts was to divide them in proportion to the specialty and simple contract debts, and pay each kind so far as was possible out of the portion of the assets corresponding to it (*In re Bentinck* (L. R. [1897], 1 Ch. 673)). Now the Court of Appeal, in *In re Sampson* (*supra*), has disregarded all these distinctions, and, following *In re Williams' Estate* (*supra*), has held that the distinction between the two kinds of debts is actually abolished, and that the executor, until the power is taken from him by an administration order, can prefer a simple contract to a specialty debt.

In his judgment Vaughan Williams, L.J., declared that the executor was entitled to retain a simple contract debt due to himself in priority to a specialty debt due to another, but Fletcher Moulton and Buckley, L.JJ., expressly stated that that point was still open. It is certainly to be hoped that the effect of this decision will not be to extend the objectionable right of retainer. That the two rights—retainer and preference—are not absolutely similar is shown by the fact that the first is only lost by the appointment of a receiver, while the latter goes when an order for administration is made—formerly when an action for administration was commenced (see *Vibart v. Coles*, L. R., 24 Q. B. D. 364).

Ankerson v. Connelly (L. R. [1906], 2 Ch. 544) is instructive as showing how a decision may alter the law on a point never considered in it. That was a case of ancient lights. The defendant had a yard adjoining the plaintiff's land. In this yard was a shed which was lighted by a window in the party wall between the plaintiff's and defendant's premises. The defendant removed the shed and covered in the yard, thus making the space to be lighted by the window much larger. The plaintiff thereupon brought an action for a declaration that the defendant had lost his right to light through increasing the burden of his easement on the plaintiff's land. Now, before *Colls v. Home and Colonial Stores, Ltd.* (L. R. [1904], A. C. 179), this contention could not be sustained, since the assumed law was then that the owner of ancient lights was entitled to all the light enjoyed by him during the period of prescription. But since *Colls v. Home and Colonial Stores, Ltd.* (*supra*), the law is settled that he is only entitled to so much light as is fairly necessary for the enjoyment of his premises. By enlarging the space to be lighted the defendant increased the amount of light necessary for this purpose in a way that could not

be defined, and so he increased the burden and lost his right altogether.

Another ancient light case (*Fear v. Morgan*, L. R. [1906], 2 Ch. 406) has just decided that two adjoining leaseholders holding from the same lessor can acquire rights of light against each other and also against their lessor. The difficulty was that as a right to light cannot be acquired only for a term of years, but, if acquired at all, must be indefeasible, it seemed to follow that it could not be acquired as against his lessor by a leaseholder whose interest in the land was only for a term of years. This was so undoubtedly at Common law, but on the construction of the Prescription Act, 1832, s. 3, the Court of Appeal held that the law was now altered.

It should be noted that though an option for purchase may be void for remoteness, that does not prevent an action lying for damages for breach of contract in refusing to sell (*Worthing Corporation v. Heather*, L. R. [1906], 2 Ch. 532); that where executors are directed to purchase an annuity for a person who dies before probate of the will is granted, such person's personal representatives are entitled to exercise after his death the option he had in life to take the value of the annuity instead of the annuity itself (*In re Robbins, Robbins v. Legge*, L. R. [1906], 2 Ch. 648); that where a legacy is left in trust for a person on attaining a certain age with a direction that the trustees shall in the meantime apply the income at their discretion for the benefit of the legatee, the legacy is vested and the legatee entitled to it at once notwithstanding the discretionary trust (*In re Williams, Williams v. Williams* [1907], 79 L. J., Ch. 41); and that where trustees are left hazardous but not wasting securities, with power to retain them unconverted, the tenant for life is entitled to the full income of such securities until conversion (*In re Bates* [1907], 76 L. J., Ch. 29).

J. A. S.

IRISH CASES.

What the Court described as a "desire for novelty or economy" brought about bad conveyancing in *In re Ford and Ferguson's Contract* ([1906], 1 Ir. R. 607). One of the earliest matters taught to the student in real property is, that for a grant by deed to pass the fee simple, the conveyance must be made to the grantee "and his heirs." Or, since the Conveyancing Act, it will be a sufficient alternative to say "in fee simple"—but not merely "in fee," as was shown by *Ethel and Mitchell and Butler's Contract* ([1901], 1 Ch. 945). In the present case, however, a grant was made "unto the grantee," with a habendum "unto and to the use of the grantee for ever." Did that pass the fee simple? And was it helped by the fact that the name of the grantee at the beginning of the deed was followed by a definition clause in the usual form: "Who and whose heirs and assigns unless the contrary intention appears are hereinafter called the grantee"? The Court (Porter, M.R.) said "No" to both questions. There was no doubt as to the intention, and the deed in a proper action would have been rectified for the asking. But terms of art cannot, even in these degenerate days, be wholly dispensed with; and the habendum's clear words could not be enlarged by the common form of the definition clause.

It may be permissible to note here, in remembrance of many years' high judicial service, that this was the last case heard by Sir A. M. Porter, late Master of the Rolls in Ireland. If one seeks, on his retirement, to write his professional epitaph, there is no need to go beyond the simple and true words: "He was a great judge."

Reported cases on a particular point seem often to occur in little groups; the constant reader of the Reports finds certain doctrines, like an intermittent volcano, bursting into

sudden activity after long intervals of quiescence. Just at present, questions as to charitable gifts seem to be (if one may push on the metaphor) in eruption. We have had to comment on several in the last few numbers of these notes (*e.g.*, *Arnott v. Arnott*, *O'Hanlon v. Logue*); and here is another—*MacLaughlin v. Campbell* ([1906], 1 Ir. R. 589). A testator made a bequest to trustees in trust for "such Roman Catholic purposes in the parish of C. and elsewhere" as they thought proper. This was held void, as not necessarily indicating a charitable or religious purpose. Most probably, the testator had meant purposes which should tend to the advancement or support of the Roman Catholic religion (which would very likely have been charitable); but then he had not said so, and the Court of Appeal had no difficulty in deciding that the bequest was void for uncertainty. There may be many purposes fittingly described as Roman Catholic which are not charitable—indeed, the ingenuity of counsel went wandering so far as to suggest that the words might be extended, if valid, to support a movement for the re-introduction of the Inquisition into Ireland. At all events, it was clear that the gift might be applied for some purpose other than charitable; and that being so, on the principle of *Morice v. Bishop of Durham* (10 Ves. 512), it failed.

"Charitable purpose" turns up again in another connection in *Commissioner of Valuation v. O'Connell* ([1906], 2 Ir. R. 479). There the King's Bench Division had to consider whether the house of a Roman Catholic parish priest, built for him by his parishioners and used by him as a residence and for parochial purposes, was exempt from poor rate as being "exclusively used for charitable purposes," and so within the exemption contained in 15 & 16 Vict., c. 63, s. 16. It was suggested that the fact of all parishioners having a right to call upon the priest in the house at any

hour of the night or day when his services might be required, rendered his user for the benefit of the parishioners, and therefore charitable. This courageous argument, however, could not induce the Court to overlook the fact that the priest had a beneficial occupation of the house as a residence, and that he was not an object of the admitted charity. The premises, therefore, were held not to be exempt.

In a mortgagee's suit to realise his mortgage, the immemorial practice of Courts of Equity in Ireland has been to decree a sale, and not foreclosure, although the suit corresponds in practically all its forms up to the final decree to the English foreclosure action. It appears, however, that the Court has jurisdiction to grant an ordinary foreclosure decree if it sees fit: but it will only do so in very exceptional circumstances. What such circumstances may be, nobody knows, for there seems to be no reported case in which a decree for foreclosure was actually made; and an unreported case alleged as an instance does not seem very clear. *Bruce v. Brophy* ([1906], 1 Ir. R. 611), shows an attempt unsuccessfully made by a mortgagee to obtain foreclosure, failing because the Court thought that the circumstances there existing were not sufficiently exceptional. These facts were: that the rents of the mortgaged premises were not enough to keep down the interest on the mortgage-debt; that the proceeds of a sale at twenty-five years' purchase would not discharge it; and that if the plaintiff were allowed to foreclose he could sell to the tenants under the Land Purchase Act 1903, and so obtain the bonus given on sales under that Act. This last was of course the real object in seeking foreclosure, though it was alleged that even the addition of the bonus to any reasonably probable price would not make up the amount of the debt. There was no other mortgage affecting the premises. All this, however, did not induce the Court to leave the well-beaten

track, more especially as the action was undefended. "The settled practice of the Irish Courts in this respect," said Barton, J., "is so well recognised, that where a mortgagee's suit is instituted in England in respect of a mortgaged estate situate in Ireland, the relief is sought and given by way of sale instead of foreclosure." An indication of the reasons for this settled practice, always assumed as proper, but nowhere very clearly explained, is to be found in the judgment of Fitzgibbon, L.J., on appeal. "We are here asked to omit the judicial step of ascertaining that the land is not worth more than the debt, and to give it over by a foreclosure decree to the mortgagee, in order to enable him to sell it over again to greater advantage." The Irish Courts in fact think, that where the land is really not worth more than the debt, a mortgagee by taking possession can get all that foreclosure would give him, notwithstanding his liability to account; and that where the land is worth more than the debt, sale is a more equitable remedy than foreclosure.

One is sometimes inclined to say in one's haste, is there any use in authorities on the construction of wills? From the venerable tag about "interpreting one man's nonsense by another man's nonsense," down to Lord Halsbury's "I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction" (*Inderwick v. Tatchell* [1903], A. C. 122), we find such authorities belittled. And now, in *O'Brien v. O'Brien* ([1906], 1 Ir. R. 649), we see the Court "entirely question the existence of any such general abstract rule as that general words cannot be cut down by a statement of things *ejusdem generis* unless an enumeration of more than one species follows." Now there is such a rule, stated in careful text-books and in cases of authority; when general words are additional to words specifically ap-

plicable to things belonging to one definite class, then *prima facie* the general words are taken to refer also only to things of that class; but if the specific words themselves include *all* the things belonging to the class, the general words are to be read in their ordinary meaning. The rule is so stated, *e.g.*, in *Underhill and Strahan on Interpretation*, Art. II. (5). But like all similar rules it yields to indications of contrary intention; and the Courts are more ready than formerly to take notice of such indications.

In the present case, there was a gift by will of "my house furniture and whatever is in the house I dwell in." The testator usually kept in a box in the house various sums of money, and £320 in cash was found in this box after his death. Was this to pass under the words "whatever is in the house"? He had amongst other legacies given one of £500 to the legatee to whom he had made the gift just stated; and there was a residuary clause whereby he directed that the residue of his property, which he estimated at over £5,000, should be divided among the pecuniary legatees in proportion to the amounts of their legacies. It was held that the money in the box did not pass under the general words of the gift, but fell into the residue.

"The case does not fall within any of the authorities cited, and I must do what I can to give effect to what the testator meant by this particular will." That is the conclusion of the whole matter now-a-days, after argument and counter-argument have discussed eight authorities between them. Still, rules are rules, and indications of intention are elusive; so we need not part with our Jarman or Theobald just yet.

J. S. B.

SCOTCH CASES.

A question which, if not strictly international, had at least an important bearing upon the Law of Nations, occupied

a full Bench of the High Court of Justiciary during the greater part of a week.¹ The ordinary full Bench of the Court of Justiciary consists of seven judges. Since 1887, however, every judge of the Civil Court is also a judge of the Criminal Court,* and as the case now referred to was considered exceptionally important, and as the judgment of the Scottish Court is final, the whole thirteen judges of the High Court were requisitioned. The case was actually heard before twelve judges, Lord Kinnear being unable to attend, on account of his duties as chairman of the Church Commission.

The charge was that of a breach of the Herring Fishery (Scotland) Act 1889, by Mortensen, a Dane, residing in Grimsby, master of the steam trawler "Niobe," registered in Norway. He was accused of a contravention of the Act and of the bye-laws passed and confirmed under the authority of the Act, in so far as he used the method of fishing known as "otter trawling," in a part of the Moray Firth, five miles or thereby east-by-north from Lossiemouth, which lies within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, and is within the area specified in the bye-laws as territorial waters of Scotland.

The defence was that the accused was a foreigner and the master of a foreign vessel, and that under the Law of Nations the *locus* of the offence was the high seas, which could not be made territorial waters by any bye-law or even by an Act of the Parliament of this country. Many weighty authorities were cited at the Bar on both sides of this interesting question. For the accused it was contended that the general result of these authorities was, that jurisdiction could only be claimed in the case of bays capable of effective control at the mouth. It was admitted that there were certain exceptions to this criterion, as in *Direct*

¹ *Mortensen v. Peters*, 43, S. L. R. 872.

Cable Co. v. Anglo-American Cable Co. (L. R. [1877], 2 App. Cas. 394), but it was contended that in no case had an area enclosed within headlands 80 miles apart, as in this case, been considered *intra fauces terrae*. The Court, however, did not give judgment upon the international aspect of the case. The question was held to be one of construction only. "An Act of Parliament duly passed by Lords and Commons and assented to by the King is supreme, and the Court is bound to give effect to its terms." If a remedy is required, it must be obtained from the Legislature.

A recent writer—if memory serves, it was Max O'Rell—humourously described his first impression of Glasgow as a vast necropolis. Thrust from a railway terminus into its leading central square, he found it so strewn with memorials of the eminent dead, that it had all the appearance of an unusually artistic cemetery. An eccentric testator, whose will was lately the subject of decision in the Second Division, sought by similar means to improve—or disfigure—the delightful tourist district of Oban in the West Highlands (*M'Caig v. University of Glasgow, etc.*, 14 Sc. L. T. Rep. 600). The deceased, in addition to considerable moveable estate, left heritage in the neighbourhood of Oban, yielding from £2,000 to £3,000 a year. This large annual sum he directed his trustees to devote to the erection and maintenance of statues of himself, his five brothers, and his three sisters on the coliseum-like building familiar to visitors to Oban, and to the construction of ornamental towers at various unspecified points on his estate. Incidentally, encouragement was given to "young and rising" sculptors and architects by the distribution of prizes and designs for these ornamental works. His sister, who was his heiress, brought a reduction of the will on the ground that it was void from uncertainty or otherwise ineffectual in law. The Court did not pronounce the deed to be uncertain in the sense that the purpose was

unintelligible, but they held that no patrimonial interest sufficient to exclude the heir had been given to anyone, and that therefore the will was invalid.

The chief defence in *M'Caig's Case* (*cit. sup.*) was that the encouragement of rising artists was sufficient to constitute the trust a charitable one for the promotion of art. It was urged that the competition for artistic statues and monuments was sufficiently charitable to preserve the will; but the Court took no account of these sporadic educational opportunities. It was held sufficient for the decision of the case, that the heir's right of succession can only be set aside by the creation of a testamentary right in some other person. The question was discussed, though the answer was not made a ground of judgment, whether this grandiose waste of money was contrary to public policy, and whether on that account the will was void. Mere waste hardly seems to come into the category of bequests at variance with the Criminal law or with the foreign policy of the State, yet a trust to throw £1,000 into the sea would not be supported, and as Lord Kyllachy observed, the present project was not far removed from that. The English case *In re Pardoe, M'Laughlin v. Attorney-General* (L. R. [1906], 2 Ch. 184), noted last quarter (*ante* p. 104), bears some resemblance to the present. Among the bequests which in that case were held by Kekewich, J., to be charitable were (1) a sum to be distributed annually at Christmas among the bell-ringers of a certain church, who should ring a peal of bells on the anniversary of the restoration of the monarchy; and (2) a bequest to a vicar and churchwardens to be applied in the erection and maintenance of headstones to the graves of pensioners in certain almshouses who should be buried in the churchyard. It is true that the scope of these bequests was wider than that of the case under notice, but it cannot

be that the English judgment proceeded upon any greater latitude of disposal permitted to testators by English law.

The law of arbitration in Scotland has not been developed to the same extent as in England, and it has received little assistance from statute law. It is viewed as a branch of the law of contract, and notwithstanding its increasing importance it is remarkable that even the latest edition of such a general text-book as Bell's *Principles* disposes of the whole subject in a few isolated sentences. Of late years, however, it has become of much more account, partly by virtue of the Arbitration (Scotland) Act 1894, and partly in consequence of the provisions as to arbitration contained in the Workmen's Compensation Act 1897. Several cases involving questions relating to arbitration were recently decided in the Court of Session. In *Licenses Insurance Corporation v. Shearer* (44 S. L. R. 6), an application was made to the Court to stop proceedings in a contractual arbitration which was *ex facie* regular, and in which the arbiters were *ex facie* well appointed. The Court refused to interfere, holding that it had not been made "perfectly plain" that the arbiters did not possess the power which they were called upon to exercise. The contract was between an English Insurance Corporation and a licence-holder in Greenock, and its substance was a pecuniary guarantee against the loss of a public-house licence, "owing to any reason beyond the control of the assured." The Contract of Insurance contained an express exclusion of the Law Courts, except in so far as necessary to give effect to the arbiter's award. The assured lost his licence and went to South Africa. In his absence a claim was intimated by law agents who were said to have been instructed verbally, but who showed no written mandate from the assured until long after the period provided by the contract for giving notice. Questions of agency and ratification

were discussed, but the Court declined to consider these until at least they had been put before the arbiters and adjudicated upon by them. It was not to be assumed that they would exceed their legal powers.

The foregoing arbitration was contractual, but that in *Sinclair v. Lochgelly Coal Co., Limited* (44 S. L. R. 2), was statutory, under the Workmen's Compensation Act 1897. The Second Schedule to that Act provides special rules as to arbitration, of which the most important is the power given to the County Court judge, or in Scotland, to the sheriff, to appoint an arbiter or arbiters in the absence of agreement between the parties on the subject. In England the County Court judge often makes such an appointment, and when made the proceedings are conducted under certain fixed rules of Court. In Scotland, however, there is no similar fixed procedure, and the power of devolution is seldom or never exercised. The sheriff is thus a compulsory arbiter in the absence of mutual agreement between the parties to the contrary, and in a large centre he has thus very arduous duties imposed upon him in addition to his ordinary work. The point in the case under notice was whether the sheriff, in granting a warrant for the registration of a memorandum of an alleged agreement between the parties, was acting as an arbiter under the provisions of the Act, or whether he was acting ministerially and in virtue of his ordinary official powers. If he acted as arbiter, then an appeal lay from his decision by way of stated case, but if his action was ministerial, then, in accordance with the case of *Binning v. Easton* ([1906], 8 F. 407), decided by a Court of seven judges, no appeal of any kind was competent. The Court held the act to be ministerial and the appeal incompetent.

R. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER
LENGTH IN SUBSEQUENT ISSUES.]

A Handbook of Legal Medicine. By W. SELLERS, M.D. Manchester: The University Press. 1906.

This volume of some 300 pages forms part of a medical series published by Manchester University. Dr. Sellers, who combines the qualifications of a doctor and a barrister, has produced a very useful hand-book for the legal profession. He mentions that it is compiled chiefly from *Taylor*, but we notice references to the works of Dr. Luff, Dr. F. J. Smith, Dr. Dixon-Mann, and other well-known authorities. The short account of the anatomy and physiology of the human body illustrated as it is with several diagrams, will make the rest of the work more easily understood by those members of the profession who have not studied such subjects. All through Dr. Sellers remembers the readers for whom he has intended his work, and whether he is treating of wounding or poisons does so from the point from which such subjects will be regarded by counsel for the prosecution and defence, or plaintiff and defendant in civil cases. Many points are given on which to test a medical witness, and references are given, where necessary, to larger works where fuller information can be obtained. Very few cases are cited, and we notice in one instance that in referring to a case, on page 265, only the reference is given and not the name of the case. The only mistake we have noticed is rather an important one, namely, the omission of the Prevention of Cruelty to Children Act 1904, although the Acts it repeals in whole or in part are given. We doubt if it is correct to speak of the "Rev. Mr. Kensit." Although allusion is made to the power possessed by *arsenic* in preventing putrefaction, no mention is made of the similar power which is possessed by *antimony*, and which was so remarkably demonstrated in *R. v. Klosowski or Chapman*. A fuller Index would increase the value of the work.

The Law of Trade Marks Registration under the Trade Marks Act 1905. By L. B. SEBASTIAN, B.C.L., M.A. London : Stevens & Sons. 1905.

The Trade Marks Act 1905 made many important changes in the law and practice of R gistration of Trade Marks, and no one is more competent than Mr. Sebastian to edit and explain that Act. Whether the definition in the Act of the registrability of a word conforms with the standard which the Author quotes with approval from the evidence of the Registrar before the Select Committee of the House of Commons, will have to be decided by the Courts before long. The true question "ought to be": "Is there a word that may or may not be wanted, and reasonably wanted, for use in trade—*i. e.*, by traders other than the particular trader applying for registration? If yes, registration should be refused; otherwise it should be allowed." There are many new provisions in this Act, and of many of them Mr. Sebastian approves. Such are the modification of the absolute prohibition of geographical names; the alteration of the expression "special and distinctive" into "special or distinctive"; and allowing user to have been either in its original form or with additions or alterations not substantially affecting the identity of the same. He also highly approves of the provisions allowing evidence from user to be given as to "the practical distinctiveness" of trade marks, and as to trade usages in actions for infringement. Important alterations have been made as to appeals, evidence, &c. The Appendix of the Act is a long one, and we also have the Rules of 1906, and a full index.

Encyclop dia of Forms and Precedents. Vol. XI. Public Safety Sale of Goods. Edited by A. UNDERHILL, M.A., LL.D., assisted by G. H. B. BOMPAS, M.A., and H. H. KING, LL.B. London : Butterworth & Co. 1906.

The present volume contains eight principal headings, namely: Public Safety and Order and Town Government; Railways; Rating; Notices of Objection and Appeal; Registration of Deeds; Registration of Title to Land; Releases; Royal Charters; and Sale of Goods. One of the most important of these is the Registration of Title to Land, which has been entrusted to Mr. Williamson, of the Land Registry, and Mr. Preston. These gentlemen have provided a comprehensive preliminary note of 40 pages, and

108 precedents for use in all the various steps that have to be taken in registering and dealing with registered land. The section on Sale of Goods, for which Messrs. Ker and Bennett are responsible, begins with an excellent preliminary note, and gives some 30 precedents of considerable variety, including agreements of various sorts, conditions of sale, notices, warranties, invoices, certificates. We are rather doubtful about the use of some of these to lawyers. We should not imagine that it is ever the business of a lawyer to draw up dock warrants and warehouse-keepers' certificates. One of the principal headings is the first—Public Safety and Order and Town Government, which has been settled by Messrs. Baines, Hill, and Butterworth: it has many sub-divisions, and 99 precedents. We need only mention that Messrs. Ryde and Konstam are responsible for Rating: Notices of Objection and Appeals, but would like to call attention to the fact that, though on certain points they recommend the reader to consult "the larger works on the subject of Rating," they are unable to recommend any particular work.

A Treatise on Order XIV. By E. A. JELF, M.A. London: Horace Cox. 1906.

Mr. Jelf well observes that the rule on which this order is founded "may be regarded as having been equivalent in practice to a legislative enactment of the first importance." He has turned his attention "to deduce the *principles* which underlie this immensely important body of law, to direct the practitioner's attention to the *procedure* which must be followed, and to sum up for the law student the *general result*." This, in our opinion, Mr. Jelf has done very successfully. He gives the text of Order III, r. 6, and Order XIV, and then discusses each rule, and the cases decided on it, at length. He also gives much useful practical advice to the practitioner, and has arranged a table of cases in which the sufficiency of the defendant's answer was considered, in order to assist his readers in the difficult task of "determining how the Master or Judge is likely to exercise his discretion." We also find some original suggestions which are worth considering. One is that in a specially endorsed writ a claim for goods might under some circumstances be included. Another is a doubt thrown out "whether a decision on the merits in favour of the defendant, *viz.*, that he ought to have unconditional leave to defend—is *res judicata* or not." Full information as to

appeals is given, and an Appendix of Forms, and the whole makes a very handy and useful book for practitioners.

Hindu and Mohammedan Law. By Sir WILLIAM MARKBY, K.C.I.E., D.C.L. Oxford: The Clarendon Press. 1906.

This is substantially a reprint of two articles contributed to the *Encyclopædia Britannica*, and is intended for the use of students and those who for any reason require a general knowledge of Hindu and Mohammedan law. In the Introduction it is related how we have come to administer these two bodies of law, and how such important subjects as "all the relations of family life, marriage, succession to property, guardianship, the ownership and enjoyment of the family home, religious questions, so far as they can be entertained by courts of law—all these are governed by rules derived from the Hindu law for Hindus, and from the Mohammedan law for Mohammedans." After giving an account of the origin and development of Hindu law, the Author points out in the second chapter, that the "all-important topic of modern Hindu law is the joint family. The whole Hindu law of ownership and succession may be said to hang upon this institution." He considers that the Hindu family remains "as a survival of the old order of society, and of a period when society was based on consanguinity." There are some interesting speculations as to whether a very early form of this society was not polyandry. Other important chapters deal with Women's Property, Marriage, and Father and Son. In the last, the Author disputes Mr. J. D. Mayne's opinion that "the notion of sonship is founded on that of ownership;" and there is an interesting account of the Hindu law of Adoption. Mohammedan law is modern compared to the Hindu, and has not, like the latter, survivals of archaic law. It is based mainly on the Koran, supplemented by the Sunnah and Hadis, the Ijmaa and the Kiyas. The Sunnah and Hadis are respectively the tradition of what the Prophet did, and what he said. The Ijmaa is a body of decisions on disputed points pronounced by the companions of the Prophet. The Kiyas are rules deducible from the three former sources. The first point that strikes one in Mohammedan law is the limitation of the power of disposition by will. A bequest cannot be made to the heir, and the property disposed of must not exceed one-third of the whole. Marriage, Divorce and Dower, are all considered, and a chapter is devoted

to the differences between the Shiah law and the Sunni law. The book is worth reading, not only by those who for professional purposes desire some knowledge of these laws, but by those who are interested in the history of institutions and comparative jurisprudence, and all who care to know by what laws so many millions of our fellow subjects regulate the more important actions of their lives.

Authority in the Church of England. By GORDON CROSSE, M.A.
London: Wells Gardner, Darton & Co. 1906.

We have read this treatise with much interest, and can recommend its perusal to all those who are interested in the present and future of the Church of England. It is really an account of the constitution of the English Church, and the Author's object in writing it has been to point out that the English Church has a constitution of its own which is expressly recognised by the law of the land, and that in recognising and acting on this fact lies the surest remedy to the insufficiency of authority in the English Church of to-day. He starts with the postulate that the universal Church, of which the Church of England is a part, is a body of divine institution, living and acting under divine guidance. In any alliance with the State the right of the latter can be visitatorial only, and does not extend to spiritual matters. He sketches the history of the government of the Church from the earliest times, and points out that all ecclesiastical authority is Episcopal, either conciliar or diocesan. He traces in an interesting manner the conflicts of the English Church with Popes and Kings, and the usurpations made by both on the Church's rights and privileges. The important events in the reign of Henry VIII are considered at length and in more detail, and great weight is attached to the "Submission of the Clergy" in 1532, when the Church, through Convocation, defined afresh the terms of its alliance with the State, and it is, Mr. Crosse considers, unquestionably valid as an act of the Church. He discusses the relation of the Church towards the Acts of Supremacy, and points out that the Acts on that subject were definitely accepted by the Church in Synod. He comments on the Georgian period of lethargy inaugurated by that "act of tyranny," the suppression of Convocation in 1717. Mr. Crosse holds decided opinions both as to the jurisdiction of that "Erastian" tribunal, the Privy Council, and the merits of its judgments. He more than once compares them unfavourably

with those of Sir Robert Phillimore. "The tone of the judgments is harsh, unsympathetic, and aggressively legal." He charges the Judicial Committee with unfairness and one-sidedness. "It was seen to have two standards for the two parties in the Church, and to be as anxious to press the law against those who offended in point of ceremonial, as to stretch it in favour of those who were accused of erring in doctrine." Mr. Crosse's contention, put forward with fairness, learning and ability, is that only properly appointed Church Courts can decide ecclesiastical questions, and that the only way to reform the Church is by the legislative authority of the Church which resides in Convocation. The remedies he proposes for the present admitted evils in the Church are, by the appointment of a purely spiritual final court of appeal, to try points of doctrine and ceremonial, on appeal from properly qualified ecclesiastical judges, and that Convocation should be free to legislate subject to the constitutional safeguard that they must conform to the laws of the State.

Act of State in English Law. By W. HARRISON MOORE.
London: John Murray. 1906.

We do not think there has been any treatise on this subject before, and the subject has many interesting points. We do not think that Mr. Moore has anywhere defined what an Act of State is, and after having read his able discussion through we are quite unable to supply one ourselves. As far as we can understand that a certain transaction is an Act of State, is a defence raised when it is sought to discuss certain transactions in Municipal Courts. It may be an Act of State because it is concerned with the rights of other States, or because it is concerned with the rights of the Crown or the Executive. Many important cases are referred to and examined where the transactions complained of have been or have not been declared to be Acts of State. Some of these are Martial Law, a difficult subject, which is considered at some length; the execution of treaties, and aliens, where there is an interesting examination of *Musgrove v. Toy*. In discussing Acts under the authority of a foreign Sovereign, Mr. Moore deals at some length with *McLeod's Case*, where the decision of the Court of the State of New York, in *The People v. McLeod*, has been generally condemned, and Webster went so far in a speech in the Senate as to say: "On the

peril and risk of my professional reputation, I now say that the opinion of the Court of New York in that case is not a respectable opinion, either on account of the result at which it arrives, or the reasoning on which it proceeds." It is fair, however, on the other hand, to call attention to Mr. Calhoun's argument, which Mr. Moore also gives. An important and very recent case is *West Rand Central Gold Mining Co. v. The King*, where the question of the liability of the Crown for the contractual obligations of an annexed State was decided, and Mr. Moore's examination of the reasons given by the Court will repay perusal. The whole work is important, as not only discussing what has been decided on these difficult and debatable points, but it gives much food for thought as regards other questions that may not improbably arise.

Corps de Droit Ottoman. By GEORGE YOUNG, M.V.O., Second Secretary of the British Embassy at Madrid. 4 volumes, forming the second part. Oxford: The Clarendon Press. 1906.

Part I of this work has met with a more than favourable reception, and we notice with pleasure that it has led to official honours being conferred on the compiler. We commented, when reviewing it, on the want of an Index; and we notice that a single Index to both parts is supplied with Part II, which is now before us, and which completes the book. In the former Part, the public law of the Turkish Empire was the principal material dealt with; in the present, private law is more prominent. Vol. IV treats of Inland Commercial law in its public aspect, and of the law of public communications, weights and measures; Vol. V of the law of public and private finance; Vol. VI of the Land law, the law of municipalities and of the civil code; Vol. VII of the criminal code, of the commercial code, and of procedure. Appendices giving the text of recent legislation are added to the last-named volume. It is curious to notice how completely French models are followed in the Turkish legislation: the work is, indeed, written in French, but the form (and in commercial matters the substance) of the codes is French also. The report of the Commission for drawing up a Civil Code is to be found in Vol. VI, and is an exceedingly interesting document, revealing an unexpected grasp of legal science on the part of Ahmed Djevdet Pasha, the Minister of Justice, and his colleagues. The successors of Ibn Khaldoun might well be expected to be philosophical thinkers: but the Western mould in which their labours

are cast shows that "Græcia Capta" has turned the tables on the conquerors of Justinian's capital.

The Austinian Theory of Law. By W. JETHRO BROWN, LL.D.
London: John Murray. 1906.

Perhaps the time has arrived when the proper treatment of Austin's work is to regard it as of historical interest only. Yet his method has a curious attraction for many minds. Short-sighted and self-confident, he reminds us of Thor sitting among the Giants and endeavouring to raise the cat of Destiny and to drink dry the horn of the Sea. The modern worship of the State naturally leads to his theories being regarded with new favour—even though two things can hardly be less alike than his mechanical sovereign and the mysterious organism in which we are nowadays taught to believe that we live and move and have our being. In the present volume Professor Brown sets out an abbreviated form of the well-known lectures 1, 5, and 6, which he has reduced in bulk by one-third, by the excision of repetition and invective and other matter involving no sacrifice of meaning. These lectures are supplemented by a few judicious notes, and by six original essays comprising about a third of the whole book. Professor Brown does not think his Author's views incapable of amendment, and he indicates the lines on which he thinks they might be re-stated. Our experience is, that to re-state Austin with a difference is invariably to deprive him of his characteristic features; and we should view with apprehension the return of that philosopher to this world to criticise such attempts. Nevertheless, the work shows signs of deep reflection, though we should hardly recommend it for the perusal of students.

The Annual Practice, 1907. By T. SNOW, M.A., C. BURNEY, and F. A. STRINGER. London: Sweet & Maxwell.

The A. B. C. Guide to Practice, 1907. By F. A. STRINGER. London: Sweet and Maxwell.

The Yearly Practice of the Supreme Court, 1907. By M. MUIR MACKENZIE, T. WILLES CHITTY, S. G. LUSHINGTON, M.A., B.C.L., and J. C. FOX. London: Butterworth & Co.

A lax practice, though dear to those whose modest desire is, as they phrase it, "to do simple justice," ends in making law the preserve of

those who are conversant with the momentary fashions of its administration. It is only by adherence to a well-known and settled system that real justice can be done. Nowhere is our present system, in its merits and its defects, so well expounded as in the volume under review. It is, indeed, difficult to believe that all the notes are not the work of one mind, so uniform is the style of the book, remote alike from prolixity and dryness. A valuable unreported case, *Charvet v. Sneyd*, is quoted, in which Channell, J., allowed judgment to be signed for fixed costs on a specially indorsed writ in a case where the debt had been paid before service. If there is one weak point in the work, it is the Index, which, though copious, has a way of disappointing the inquirer.

The A. B. C. Guide, uniform with the above, seems to supply a felt want. It is some years since it first appeared, and it may now be regarded as a hardy annual.

The *Yearly Practice* is now firmly established in public favour. Although we have been accustomed to regard the *Annual Practice* as superior in style, substance and arrangement, the fact that so many of the profession prefer the *Yearly Practice* as their *vade-mecum* strongly suggests that it is merely a matter of taste and personal predilection. Important new regulations which are incorporated in both works are R.S.C., May, 1906,—Practice Masters' revised rules on Fixed Costs (May 18, 1906), and on drawing up chamber orders,—and the Middlesex C.C. Rules, 1906. The *Yearly Practice* also prints the new Crown Office Rules (1906).

The Common Law of South Africa. Vol. 3. By MANFRED NATHAN, LL.D. London: Butterworth & Co. Grahamstown, Cape Colony: The African Book Company. 1906.

After an interval of nearly two years, the third volume of Mr. Nathan's work on the Common Law of South Africa has made its appearance. The size of the work lends colour to the oft-repeated arguments in favour of some scheme of codification. The principles of Common law are taken from authors who lived long before the present requirements of advanced law. Much of their work is obsolete, and renders it hard for the lawyer to say with any degree

of certainty what the Courts will conserve and what they will disregard as being inapplicable to modern conditions. Mr. Nathan's text-book makes this fact plain, as in his desire to make his researches complete, much is included which is not of the slightest practical utility to the student or lawyer of the present day. That the writings of Voet and other well-known Roman-Dutch lawyers are of great academic interest, as showing the developments of the several principles, there can be no doubt, but the fact of their diverse personal opinions often makes confusion worse confounded. If only there could be some unanimity as to what is the Common law of South Africa, it would be a great boon to the lawyer. Each colony in South Africa, however, has its own Supreme Court, which, although striving to make their decisions coincide, sometimes differ on fundamental principles. This is notable in the case of consideration necessary to support contracts. Whereas the Supreme Court of the Cape has decided that the English doctrine of Consideration has been imported into the Roman-Dutch law of South Africa, the Supreme Court of the Transvaal, as late as 1904, in the case of *Rood v. Wallach* ([1904], T. S. 187), has taken the opposite view, thus supporting the opinion expressed in his *Commentaries on Van Leeuwen* by Mr. Justice Kotze. This diversity of opinion in more than one instance renders it necessary for Mr. Nathan to give in full the opinions of judges in the different colonies, and so expands his work into three volumes of imposing size. It must be said that Mr. Nathan has acquitted himself of the task most creditably. His book is a very mine of information on every conceivable point. One defect lies in the fact that he has more or less moulded the arrangement of his subjects on the lines of Voet's *Commentaries*, thereby rendering it necessary, when looking up a point, to wade through all three volumes in order to make sure of not having missed any information on the subject. For instance, we find Fraud dealt with in Volume 2, and also in Volume 3, each portion dealing with various aspects of the same subject. In Volume 3 a marked improvement in the comprehensive and explanatory character of the Index is noticeable. Mr. Nathan has undertaken a great task, and now at the end of it he may well view with complacency the result of his labours, which does credit alike to his industry as well as to his known ability as a scholar in Roman-Dutch law.

Precedents for Registered Land. By J. E. HOGG. London: Stevens & Sons. 1907.

Mr. Hogg has, we doubt not, supplied a felt want in this book. As he points out, there was no volume, before his own, exclusively devoted to Conveyancing Precedents. He observes that there is at present a certain degree of misunderstanding between the Land Registry and conveyancing practitioners. The registry aims at brevity, the conveyancer at safety. Mr. Hogg has set himself, amongst other things, to show the faults of each. He has carefully considered the Acts and Rules, and has embodied the result in the precedents and notes. We cannot do better than give in his own words the summary of the chief matters dealt with:—(1) What differences should be made in ordinary conveyancing documents in consequence of the new system of registration under the Land Transfer Acts: (2) What clauses and provisions should, and what should not, be inserted in statutory instruments: (3) What provisions are better placed in documents off the register than in registered instruments: (4) When a separate document off the register, altogether independent of the registered instrument, is necessary or advisable, and what this unregistered document is to contain. All this appears to be fully and admirably dealt with. There are excellent Tables of Cases and Statutes; and we should say that the book is one of decided value.

Commerce in War. By L. A. ATHERLEY-JONES, K.C., M.P., assisted by H. H. L. BELLLOT, D.C.L. London: Methuen & Co. 1907.

This work should take high rank as one of the most opportune and valuable contributions to special subjects of International law made during the last few years. It has the merit of confining itself to one department (perhaps the largest) of that law, treating it exhaustively by collating the materials and citing at length much of the actual text of treaties, administrative orders and decrees, judgments and the opinions of jurists, and supplementing this survey with comments and indications rather than formulations of what should be the authoritative view on each question. Following this historical method, the work embraces contraband, blockade, continuous voyages, carriage of property at sea, visit and search, capture and condemnation, and recapture and rescue; and so far as a

cursory examination can show, it amply fulfils the aim of the Authors, "to provide a full exposition of the rules of International law which govern the commercial relations of the subjects of neutral and belligerent States": and it should be a book highly useful as a work of reference to all officials who have duties connected with British commerce, as well as the representatives of that commerce, notably the large maritime interests. In addition to the collaboration of Mr. Bellot, the Author acknowledges the advantage he has received in having the assistance of Dr. Baty. The line of opinion indicated by the Author in more than one passage has the merit of being quite detached from national bias, *e.g.*, he admits that the judgments of the British Prize Court, like those of other nations, have generally followed the public policy of their country. On the present occasion only the treatment of one subject in the work can be noticed. In the chapter on Contraband and Continuous Voyages, the traditional British view is upheld, *viz.*, that the nature of contraband is to be determined solely by the actual naval destination of the goods, and that the intention of the goods owner as to their ultimate destination is not to be investigated. It may be, as the Author suggests, that the support given by continental jurists to the "intention" theory is partly due to their limiting contraband to weapons of warfare; but the fact remains that it has as supporters not only the Institute of International Law, but judicial decisions in the United States, France and Italy, and was put forward by the British Government in the case of the German steamers *Herzog* and *Bundesrath* during the South African war. These later developments may well outweigh the expressions in the earlier statements of doctrine and judicial decisions dealing with different circumstances, and in a science like International law dealing with constantly changing conditions, adherence to the letter of former precedents is not likely to carry the day. In connection with this same subject, the Author points out that the judgment of the St. Petersburg Prize Court in the *Calchas* case may probably have made a contribution of permanent value to International law, in its definition of contraband under the Russian Prize Regulations, as applicable only to specified articles when transported on account of or destined for the enemy, *i.e.*, the enemy's Government, contractors, army, navy, fortresses or naval harbours, and not for private individuals subjects of the enemy's country, and more especially neutral governments or private individuals,

Company Law in South Africa. By L. O. P. PYEMONT, B.A., LL.B. Cape Town: The Cape Times, Limited. London: Jordan & Sons. 1906.

This work is avowedly based on the 26th edition of *A Handy Book on Joint Stock Companies*, by Messrs. Gore-Browne and Jordan. The arrangement of the headings and subjects is practically identical, and therefore speaks for itself as being a useful book for lawyers as well as for laymen. The first book treats of the formation and constitution of a Company, the second with the management and conduct of the business of the Company, and the third with the winding up of Companies. Book four deals with the points of variance between the Cape Company law, English Company law, and the Company law of the other South African Colonies. To this important subject Mr. Pyemont devotes forty pages, which hardly seems enough space in which to adequately deal with a matter so vital to those seeking information on the Company law of *South Africa*. It is a matter of notoriety that the Transvaal possesses Companies whose operations are by far the most important in South Africa, and yet only ten pages are allotted to the points of variance appertaining to that Colony. Another ground for criticism is the long list of *Errata* at the beginning, made up of eighteen items. This is manifestly not the fault of either printers or publishers. Nothing is more aggravating to the lawyer than to find a page or figure corrected in a list of *Errata* after he has made a careful and fruitless search for the reference as given in the text. After making these two criticisms, we are bound to say that the work shows great signs of research and erudition. Mr. Pyemont is evidently well up in his subject, and if, in a future edition, he would make his book more a treatise on the Company law of *South Africa* and less a treatise on the Company law of *Cape Colony*, he will very largely add to the number of his readers both on this and on the other side of the water. The Index is well arranged and copious, although one misses many titles or headings familiar, to the practising lawyer, in works of a similar character.

Second Edition. *Interpretation of Wills and Settlements.* By A. UNDERHILL, M.A., LL.D., and J. A. STRAHAN, M.A., LL.B. London: Butterworth & Co. 1906.

The Authors, in their preface, quote the *obiter dictum* of a judge; that he did not believe there were any rules for the interpretation of

wills or settlements, and they point out that this is so where a will or deed is unambiguous. But, unfortunately, a large number of wills and deeds are ambiguous and contradictory, and the common-sense and sound judgment which avail to decide unambiguous documents, have to give place to certain principles laid down by former judges. To these principles the Authors have devoted themselves in the volume before us, and have, we think, done their work well. It is a book of considerable value to practitioners. The whole subject appears to be covered, and is well divided into seven parts, dealing in order with General Principles; Description of Donees; Description of Property; Interests Transferred; Conditional Interests under Wills and Settlements; Charges on Debts, Legacies and Annuities; and Executory Settlements. Each Part is divided into articles, with an index to their contents at the beginning; and what may be called the "Codification" method has been adopted. All the recent decisions bearing on the subject seem to be included. We have occasionally had to comment on the insufficiency of Tables of Cases. That of Messrs. Underhill and Strahan is as complete as could be desired, and altogether, if we except the *Corrigenda*, which ought not to be necessary, the book may be described as a model of what a text-book should be.

Third Edition. *Banning's Law of the Limitation of Actions.*
By A. BROWN. London: Stevens & Haynes. 1906.

In editing this standard work Mr. Brown is justified in saying that he has in a great measure re-written it. "Prior to the year 1833," observes Mr. W. D. Edwards, "the law of limitation depended chiefly upon the statutes of Henry VIII and James I, and was in a very confused and unsatisfactory state." The way in which the subject has since been dealt with by legislation, both in relation to real and personal property, makes its state "confused and unsatisfactory" to this day; but Mr. Brown is an excellent and trustworthy guide to its intricacies. A fuller discussion might have been given of the circumstances in which delay (within the period of legal limitation) may be a bar to equitable remedies in support of legal rights. The point is referred to under the head of Nuisance, but the case cited (*Fullwood v. F.*), is not a case of nuisance at all. Sir E. Fry there decided that mere lapse of time will not be a bar to the granting of an injunction unless it would be a bar to the legal

right as well. The effect on the lord's position of long possession by a stranger or mortgagee of copyhold land is, again, a matter on which no one is better able to enlighten us than Mr. Brown. A few pages would not have been mis-spent in dealing with that topic. These are, however, details. The Author has provided a valuable alternative to Darby and Bosanquet, hitherto (with the exception of Dr. Hewitt's treatise) our sole modern authority on the topic as a whole. As the latest editions of these works date from 1893, there should be a considerable demand for Mr. Brown's book.

Third Edition. *Chapters on the Law relating to the Colonies.* By C. J. TARRING, M.A. London: Stevens & Haynes. 1906.

On the hypothesis that the amount of litigation is a gauge of a country's prosperity, we may deduce that our colonies, as a whole, are prospering. Since Mr. Tarring published the second edition of this book in 1893, the number of cases decided by the Privy Council has increased from 780 to some 1,140. The bulk of these are supplied by Canada and Australia. Several additions have been made to this scholarly work since the last edition. The chapter containing the Imperial Statutes has been revised and brought down to date. The book is too well known to need any further description than that, in a moderate compass, it deals fully with the constitutions and judiciary of our several colonies and the laws to which they are subject. There is a Topical Index of Cases on Appeal; and altogether the production of the book leaves nothing to be desired.

Third Edition. *A Digest of the Law of Agency.* By W. BOWSTEAD. London: Sweet & Maxwell. 1907.

Mr. Bowstead's book, as the title implies, is framed in the form of a code which might be incorporated in an Act of Parliament. It is a method of treatment not unfamiliar to lawyers as adopted, for instance, in various works of Dicey, Pollock, and Chalmers. To each proposition of the 146 which the Author presents, there is added a list of the principal decisions bearing upon it, under the guise of "illustrations." This is a somewhat ironic title, when, as occasionally happens, the "illustrations" are not easy to reconcile with each other; and little attempt is made to comment on them. For those who are content with terse, if generalised, statements, with full and carefully noted up references to authorities, the work

must prove of much utility. American cases, however, are not quoted, and very few from Scotland or Ireland. Mr. Bowstead prints as an Appendix the Factors Act 1889 and the Prevention of Corruption Act 1906; in relation to the latter he pertinently points out that since all prosecutions under the Act require the consent of a Law Officer, the application to it of the Vexatious Indictments Act is nugatory—for the provisions of that statute do not, of course, apply to prosecutions which have that consent in writing.

Fourth Edition. *Saint's Registration Cases 1843—1906.* By T. MATHEW, M.A. London: Butterworth & Co. 1906.

The new edition of this work will be welcome to revising barristers and all interested in registration. The book takes the form of a digest. All the recent cases on the subject appear to be included; the most important being the "latchkey case," *Kent v. Fittall* (L. R. [1906], 1 K. B. 60). *Brooks v. Baker* (L. R. [1906], 1 K. B. 11); *Perkins v. Grocote* (L. R. [1904], 1 K. B. 374); *Ash v. Nicholl* (L. R. [1905], 1 K. B. 13); are other valuable decisions which the Editor has included. The Table of Cases, Grouped According to Subject Matter, is useful: but we consider that the Table of Cases proper should contain references to the Reports.

Sixth Edition. *A Manual of the Principles of Equity.* By C. THWAITES. London: George Barber. 1906.

Six editions in twenty years is a very fair record for a law book, and of this Mr. Thwaites' *Manual* can boast. The original Author of this work was Mr. Indermaur, but Mr. Thwaites has been associated with it from the beginning, and is now solely responsible for its production. It is, of course, primarily intended for students, but we have always been of the opinion that a really good book for students must often be of considerable assistance to practitioners, and this work is no exception to that rule. We are glad to notice the stress Mr. Thwaites lays on the student paying the greatest attention to "the Maxims of Equity;" he says truly "he will find practically every important doctrine of the Court depending upon or proceeding through them." The very large experience Mr. Thwaites has had in legal tuition gives him the power of combining conciseness with clearness in an unusual degree, and also the knowledge of what parts of his subject it is desirable to enlarge upon.

Sixth Edition. *Introduction to Conveyancing and Registration of Land.* By Sir W. H. ELPHINSTONE, Bart., M.A., G. H. J. HURST, M.A., and L. H. ELPHINSTONE. London: Sweet & Maxwell. 1906.

A new edition of this excellent book is welcome. As an introduction to Conveyancing for students it is unsurpassed. It deals both with broad principles and details of real property law, and the minutæ of Conveyancing, such as the advice against writing on both sides of the paper or placing the lines too close together. If any of our readers wish to get an idea of how practical and excellent the advice given by the Authors is, we advise them to turn to the chapter on Wills, and carefully observe how that most important but often most difficult subject is treated. We are afraid that the warning there contained against testators making their own Wills will only be read by professional men who are already convinced. The Appendix on Registration will be found very useful.

Sixth Edition. *Principles of Pleading and Practice.* By W. BLAKE ODGERS, M.A., LL.D., K.C. London: Stevens & Sons. 1906.

The fact of its attaining six editions in six years is the best commendation which a law book can produce. Our tribute is nevertheless due to the attractiveness and clearness of Dr. Blake Odgers' work. It is written with a thorough comprehension of the needs of students, and a knowledge of the fact that underneath the superficial dryness of Practice lies a solid stratum of good common-sense, which only needs judicious exposition to make it very interesting. Sir Frederick Pollock somewhere tells us that the composition of law treatises is not conducive to literary style. The reviewer is not often permitted to forget the truth of this dismal *dictum*; but that defect cannot be charged against Dr. Odgers, and the young aspirant who turns to his book is in no danger of eating "sawdust without butter."

Eighth Edition. *Addison's Law of Torts.* By W. E. GORDON, M.A., and W. H. GRIFFITH. London: Stevens & Sons. 1906.

Addison on Torts has long been a well-known and esteemed authority on its subject. The Editors of the present edition have made great efforts to maintain the high standard of previous

editions. A very considerable amount of careful work has been done in the shape of additions, revision, and re-arrangement. For instance, a new chapter, the eighth, is devoted to the very important subject of Negligence, which had been hitherto inadequately treated. This includes the Workmen's Compensation Act 1897. Another subject now added is that of Wrongful Distress. An important step that the present Editors have taken is that of re-writing the whole of the first chapter on the Nature of Torts, and this in consequence of the more scientific and systematic consideration of the subject that has been brought about of late years by the labours of Sir F. Pollock and Messrs. Clerk and Lindsell. The result of these and other additions and alterations will be to considerably enlarge the volume, which now contains nearly 1,100 pages of text, in addition to 120 pages of Index, but we do not think an attentive perusal will show much that could with advantage have been omitted. The Editors rather pathetically lament that it did not come within their mandate to discard "all but passing references to matters so foreign to the law of Torts as the Bankruptcy Acts, the Bills of Sale Acts, and the Lands Clauses Act 1845."

Sixteenth Edition. *Williams' Principles of the Law of Personal Property.* By T. C. WILLIAMS. London: Sweet & Maxwell. 1906.

Williams on Personal Property, if not quite as well known as *Williams on Real Property*, is, we venture to think, much the better book. It has been kept well abreast of recent legislation and decisions, and we can only regret that *In re Samson, Robbins v. Alexander* (L. R. [1906], 2 Ch. 584) should have been reported too late to be considered by the Editor (though it is noted). He has taken particular pains to make clear the embarrassing *catena* of decisions on the loose clause of the J. A. 1875, which imported bankruptcy principles into the administration of insolvent estates, and he has prepared an elaborate and useful table exhibiting the result of the cases bearing on the subject. "The Legislature," he says, "has taken every course but the straightforward one of enacting that the deceased person's debts shall be paid by his executors or administrators in the order desired, and," he goes on, "the crookedness of the statutory way has been exactly doubled by the manner in which the Courts have proceeded"—inclining in one direction for twenty-five years, and in the opposite direction since. "When reforms are carried out in this fashion, who can wonder," he rightly concludes,

"that the English law is here complex, anomalous, uncertain, and hardly to be understood, even by experts who have given their lives to its study?" In dealing with the law of patents, Mr. Williams seems to have overlooked the important innovation (long advocated by Lord Justice Moulton) in accordance with which a provisional specification or a specification fifty years old is not necessarily to be regarded as an anticipation (2 Edw. VII, c. 34, sects. 1, 2; *cf. Harris v. Rothwell*, 35 Ch. D. 416).

Eighteenth Edition. *Rogers on Elections*. Vol. III: Municipal and other Elections and Petitions. By C. W. WILLIAMS, B.A., assisted by G. H. B. KENRICK, LL.D. London: Stevens & Sons. 1906.

The seventeenth edition of this well-known standard work was published in 1894. Since that date, much legislation has been passed, necessitating a fresh edition, a work which has been most ably performed by Mr. Williams. Since the date of the last edition, many important changes have taken place. The School Boards, metropolitan administrative vestries, and the Woolwich Local Board have ceased to exist; and the Borough and County Councils now perform the duties of the first of these, while the metropolitan borough councils elected under the London Government Act 1899 are the successors to the other two. The present edition deals with nine elections, comprising such important bodies as Borough, County, and Parish Councils. All are aware of the immense amount of judicial decision affecting the election of these bodies, which has accumulated of late years. It is most important, on this account, that practitioners connected with these Councils should keep themselves abreast with all this new law, hence the importance of the present edition. Moreover, when one considers that we are on the eve of a County Council general election, its necessity is still more apparent. The all-important question of costs was materially altered in 1902; and by Order LXV, r. 27 (29), a very much wider discretion was given to the Taxing Master in regard to general items allowable on Taxation; and since then many decisions have been given showing how far the Court is prepared to permit this discretion to be carried. As to criticism of the work, all that is possible has been said in the past, but we would like to add that the high standard originally set has been fully maintained in the present edition.

Party Walls. By A. R. RUDALL. London: Jordan & Sons. 1907.—We doubt not that this small book will prove of use, not only to barristers and solicitors, but also to many architects and surveyors who must constantly be confronted with questions on this subject. Mr. Rudall has divided his work into two parts. The first is devoted to Party Walls and the rights and liabilities of adjoining owners in relation thereto at Common law; while the second, and by far the larger part, deals with the London Building Act 1894. It probably would never occur to the layman that the term "party wall" is used, with regard to ownership and right of user, in four different senses: (1) A wall of which the adjoining owners are tenants in common; (2) A wall divided longitudinally into two strips, one belonging to each of the neighbouring owners; (3) A wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; (4) A wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the other moiety. There is a fair amount of Common law bearing on the subject, and many important cases such as *Cubitt v. Porter* (8 Barn. & Cres.); *Watson v. Gray* (14 Ch. D.); *The Sheffield Improved Industrial and Provident Society v. Jarvis* ([1871], W. N. 208); *Mayfair Property Co. v. Johnston* (L. R. [1894], 1 Ch. 508). With all this the Author clearly deals, as he does with the London Building Act 1894. All the recent cases on the subject are apparently included, such as *Lewis and Solome v. Charing Cross, Euston and Hampstead Railway Co.* (L. R. [1906], 1 Ch. 508).

A Digest of the Law of Copyright. By E. J. MACGILLIVRAY, LL.B. London: Butterworth & Co. 1906.—This little book is, we gather, the answer to a question whether it would be possible to make a clear complete and accurate statement of the Law of Copyright within the compass of sixty-four octavo pages. Mr. Macgillivray is already known as an Author on the subject, and we think that the book under review will be of considerable value to the profession. It is presented in the form of a codification of the law. Mr. Macgillivray says with reason that such codification will be useful to the legislator of the future, rather as a warning what to avoid than as a guide to follow, and urges that any future legislation on the subject should be built on new foundations. The law is set forth as clearly as possible, and the Author appears to have dealt with every branch of the subject. The latest decisions on questions of Copyright, among which we notice *Hardacre v. Armstrong* ([1905], 21 T. L. R. 189); *Macmillan v. Dent* (L. R. [1906], 1 Ch. 101); *Rex v. Willetts* ([1906], *Times*, 19th January), are included, together with the chief American cases. We may notice that the case of *Tuck v. Priest* ([1887], 19 Q. B. D.), is wrongly referred to 14 Q. B. D.

Outlines of Banking Law. By R. RINGWOOD, M.A. London: Stevens & Haynes. 1906.—The Author, in his preface, states that he aims merely at presenting "certain legal principles of which no lawyer or law student can afford to be ignorant, and which may assist the Bank Manager in every-day business." Criticism is, therefore, partly disarmed, but it appears to us, after glancing through the book, that there are certain omissions. We can find, for instance, no mention of stamps. The stamping of bankers' charges is an important

matter. We understand that Somerset House in 1906 issued fresh requirements as to the treatment for the purposes of stamping of primary and collateral securities. Again, the Author appears to have treated very insufficiently the subject of equitable and legal mortgages of real property, although it is well known that these form no inconsiderable part of a banker's security. On page 33, where the Author deals with trust accounts, he might have added that as a matter of practice bankers never recognise Trusts, and only take accounts as of individuals, or in the names of individuals as executors. These and other faults are capable of correction in a future edition; but we fear that the subject is too large to be fully treated in so small a compass. There is a good Table of Cases.

The Recovery of Stolen Goods. By C. L. ATTENBOROUGH. London: Stevens & Haynes. 1906.—Mr. Attenborough is very much to be congratulated on his able and (having regard to the intricacies of the subject) lucid exposition of this most interesting and important branch of the law. We believe that his practice has lain in this direction, and that he is therefore well qualified to deal with the question. The difficulties which arise in applying section 100 of the Larceny Act 1861 to cases arising under certain sections of the Factors Act 1889 and the Sale of Goods Act 1893 are admirably dealt with, and the book should be of material assistance to any one who has to consider nice questions of property. We must draw attention to the fact that the Table of Cases has no references. It is time that this practice on the part of legal authors was definitely abandoned.

Accounts of Executors and Trustees. 2 Vols. By P. W. CHANDLER. London: Butterworth & Co. 1906.—There has recently been a good deal of correspondence concerning the keeping of accounts by solicitor trustees. This book, therefore, which has, we are told, been written on the suggestion of the Council of the Law Society, comes at a seasonable time. The Author takes the reader through a set of accounts dealing with every item *seriatim*. So far as we can see, Mr. Chandler has done his work clearly and methodically, and the book will be found useful to solicitors.

Trial of Deacon Brodie. Edited by W. ROUGHEAD. London: Sweet & Maxwell. 1906.—The story of a double life has long been a favourite theme with novelists. A man who can comport himself as a reputable citizen and win the respect of his fellows, the while he is secretly offending against every law and rule of citizenship, is an interesting, if morbid, study. There have been many such cases at different periods, and one can recollect men of our own time whose careers when exposed to light have not been dissimilar to that of Deacon Brodie, the subject of the book under review. The chief interest of this criminal's career lies in his marvellous duplication of the parts of burglar and burgess. His crimes, in themselves, were coarse and common. The full report of the trial is here given, and the book is illustrated with a number of portraits of judges, counsel and prisoners, which, together with an admirable introduction, make a work of considerable interest.

Railway and Canal Traffic Cases. Vol. XII. By J. H. BALFOUR BROWNE, K.C., W. H. MACNAMARA, and R. NEVILLE, LL.B. London: Sweet & Maxwell. 1906.—The twelfth volume of the Reports of Cases decided by the Railway and Canal Commissioners will be welcome to the Parliamentary Bar. The volume is as admirably produced as its predecessors. The digest at the beginning is valuable. Eighteen cases are dealt with in the volume.

The Philosophy of Proof.—By J. R. GULSON. London: Routledge & Sons. 1905.—In his preface the Author says that some years ago he detected, as he thought, a “screw loose” in the commonly accepted theory of legal proof. This has led him to write the present work. His purpose, he says, is “to treat the subject of evidence from a philosophical point of view, to deal chiefly with principles, and to touch upon the rules of positive law only so far as they are affected by and serve to illustrate those principles.” Let us say at once that logic, in its highest sense should, of course, guide practical men as well as theorists; but what is known as the lawyer’s instinct, aided by a working knowledge of the commercial world, has produced much of the actual law, of evidence *inter alia*, which satisfies the needs of this country. When, therefore, the Author suggests actual alterations in the law, such as the over-ruling of *Slatterie v. Pooley*, one of the treasured decisions in *Meeson & Welsby* (Vol. VI, 664); the abolition of many of the rules for admitting public documents without proof; the curtailment of the powers of the judges in cases of contempt of court; or the suppression of the venerated rule of Best Evidence, we should be very slow to assent to any such revolutionary change until practised lawyers approved the step. We gather that the Author himself has a similar hesitation. Academic study of this nature is not, it is to be feared, common, but there may be some to whom the book will be of interest.

Burial Grounds and Cemeteries. By E. AUSTIN. London: Butterworth & Co. 1907.—The Author of this book refers to Mr. Brooke Little’s *Law of Burials* on all substantial questions of law which are likely to arise in connection with his subject. The present volume is not a law-book in the strict sense, but is one of those small manuals which the industry of legal authors has been accustomed for some years to supply to assist those who have to carry out the administration of various public departments of usefulness, and which do so much to save the time of those concerned.

A Treatise on the Law concerning Names and Changes of Name. By A. C. FOX-DAVIES and P. W. P. CARLYON-BRITTON, F.S.A. London: Elliot Stock. 1906.—Mr. Fox-Davies is indeed versatile. He is known to us as genealogist, novelist and lawyer. In the publishers’ “fore-note” of the book before us Mr. Fox-Davies and Mr. Carlyon-Britton observe that “the ever recurring desire on the part of . . . the General Public to change their surnames is amply evidenced by the daily appearance of advertisements.” We wonder whether it is realised to how great an extent this process is going on. Every day some alien patronymic is quietly changed into a fine old English name; while there are one or two once purely English names which are now almost

entirely associated with Hebrews. There is unfortunately no redress as the law stands; but there are many who would gladly sacrifice a vote to the Party who would legislate on the subject. We consider it wrong that there should be no copyright in a name, although it is clear that any attempt at legislation would be fraught with much difficulty. Mr. Fox-Davies and Mr. Carlyon-Britton have dealt with a subject of much interest, and have treated it admirably. The legal aspect is fully set out, and the different methods by which Blogg can develop into Montmorency, and Rosenbaum into Cavendish, are made clear. Incidentally there is a wealth of entertaining historical and genealogical matter, and others than lawyers may well find the book of interest.

Bernard's First Year of Roman Law. Translated by C. P. SHERMAN, D.C.L. New York: The Oxford University Press.—There are many text books on this subject which, in this country, we suppose are little read except by students. Dr. Bernard is known as a learned French jurist, and the translation has been excellently done by Mr. Sherman. The treatise is in six books, of which the first is an historical survey showing the development of the Constitution to Justinian. The second deals with Persons, the third with Things, while Actions, Ownership, and Successions, are the subjects of the last three. The sub-division of the books into titles, further sub-divided into chapters, is rather confusing. Apart from this the book is well produced, with numbered paragraphs and headings in bold type

Appeal Cases under the Weights and Measures Acts. By G. F. ALLWOOD. London: Butterworth & Co. 1906.—This book will no doubt prove useful to Inspectors of Weights and Measures and others. A large number of Appeal Cases are contained in chronological order from 1801 (*Davidson v. Moscrop*, 2 East 56) to 1906 (*Blackshaw v. Swarthmoor and Ulverstone (Lancs.) Co-operative Society*, *The Monthly Review*, May, 1906). Two very useful Tables are included, the one a Table of the sections of Acts of Parliament under which cases have been decided; the other an Analytical Table of Cases grouping the various cases under the points they decide.

Secretarial Work and Practice. By A. NIXON and G. H. RICHARDSON; also *Company Law*, by T. PRICE. London: Longmans, Green & Co. 1906.—This book contains the substance of a series of lectures given at the Manchester Municipal School of Commerce on Secretarial Work and Company Law. We imagine that it will be most valuable to all persons connected with companies. It deals incidentally with every stage of a company's existence; has a large number of forms, and contains advice on a Secretary's duties and responsibilities which is certain to be of use. The book is excellently produced.

Smith's De Republica Anglorum. Edited by L. ALSTON; with a preface by F. W. MAITLAND, LL.D. Cambridge: The University Press. 1906.—It seemed fit and proper, says Professor Maitland, that the new edition should proceed from the Press of the University of which Sir Thomas Smith was in his day one of the most illustrious sons. The learned work, which Mr. Alston

has edited excellently, is in three Books. The first treats of the estates of the realm and of varieties of Constitution. The second of Parliament, and of the various tribunals of the Country; and the third of Appeals, of the "Court of Starre Chamber," the Courts of Wards and Liveries, and the Ecclesiastical Courts. The introduction and Appendices are admirable.

The Licensing Act, 1904. Second Edition. By F. E. SLEE, M.A., B.C.L. London: The Review Press. 1906.—An explanation of the provisions of this important statute, together with the text of the Act and all the rules made thereunder.

The Handy Book to Solicitors' Costs. Second Edition. By A. C. DAYES. London: Sweet & Maxwell. 1906.—When a text-book or law manual arrives at a second edition, we suppose it may be said to have justified its existence. The book under review seems to be more or less a series of extracts from the *Annual County Court Practice*, *Mayor's Court Practice*, etc.; but the busy practitioner is glad, doubtless, of a book summarising the various charges under one cover. We think that the arrangement of headings might be better. Looking, for instance, for "Setting down," we find no separate heading, but have to refer to "Trial." We understand that "Setting down" is a distinct charge.

French Law and Customs for the Anglo-Saxon. Second Edition. By A. S. BROWNE. London: The Health Resorts Bureau. 1907.—Although this little work can hardly be viewed in the light of a serious treatise on law, at the same time its practical utility to the travelling lawyer can hardly be overrated. Its law is given, if one may be allowed the phrase, in homœopathic literary pilule form. In a few clear sentences the law is stated on any particular point, without reference to cases or even to the laws themselves. As to the correctness of this summary, one is bound to rely on the standing and knowledge of the Author. Mr. Browne is, we believe, an English lawyer practising at Nice, and solicitor to H.B.M. Consulate there. This fact should make him thoroughly conversant with the law applicable to the hundred and one little points which crop up when travelling in France, the ignorance of which often quite unwittingly places the traveller at variance with the somewhat bureaucratic officials of that country. To any reader, whether or not he be a lawyer, information of a most useful and comprehensive nature is supplied. That it has been found necessary to produce a second and enlarged edition proves that there is a considerable portion of the public which has grasped its usefulness. The book also has the additional advantage of being a handy size for the travelling bag, and so easily accessible for reference.

Wright and Hobhouse's Local Government and Local Taxation. Third Edition. By the Right Hon. HENRY HOBHOUSE and E. L. FANSHAW. London: Sweet & Maxwell. 1906.—The Authors' names are in themselves a warranty of the value of the contents of the book. The first edition was published in 1884, based on two elaborate memoranda on Local Government by Mr. R. S. Wright. The Editors of the present edition have brought the book

thoroughly up to date. The chapter on Education has been re-written, and various additions have been made to those on Licensing, Miscellaneous Matter, etc. So complex has become the modern law of Local Government, and so greatly multiplied have been the various authorities under whom it has been placed, that it was a work of great usefulness to analyse the various units of this great whole, and to show the several rôles which each plays. The financial considerations which apply to local authorities are the most difficult to understand, and so clear an explanation in such small compass ought to be invaluable to all those whose business or circumstances bring them in contact with the subject. There are some most instructive Tables at the end of the book. The Comparative Statement showing (1) the Ratable Value; (2) The Receipts of Local Authorities; (3) The Expenditure of Local Authorities; (4) Local Loans outstanding—is calculated to give pause to thinking men. We find, for instance, that from £60,000,000 in 1867-8, the Loans Outstanding have grown to £370,607,000 in 1902-3. The loan transactions by Urban Authorities are equally remarkable. We consider that this is a work of more than ordinary value.

Time Tables on a new and simplified plan. Fifth Edition. By T. READER. London: Longmans, Green & Co. 1906.—A book for the purpose of facilitating the operation of discounting bills, and the calculation of interest on banking and current accounts, etc., showing without calculation the number of days from every day in the year to any other day for any period not exceeding 365 days.

*A Summary of the Law of Companies. Ninth Edition.** By T. E. SMITH and A. STIEBEL, M.A. London: Stevens & Haynes. 1907.—This book has long been known as an excellent guide to the main principles of Company law. It has now been entirely recast and re-written. The portions concerning Memorandum of Association of a Company, Debentures, Winding-up and Reconstruction, have been enlarged. The revision has been thoroughly done, and so far as we can see most of the recent decisions are referred to. We do not find any mention of *Attorney-General v. Mersey Railway Company*, an important decision on *ultra vires*. The appeal on the case has only just been heard, but the judgment of Mr. Justice Warrington might have been noted.

The Secretary's Manual on the Law and Practice of Joint Stock Companies. Eleventh Edition. By J. FITZPATRICK, F.C.A., and T. E. HAYDON, M.A. London: Jordan & Sons. 1907.—There seems to be no end to books dealing with every branch of Company law, some no doubt never reach a second edition. When, however, a really useful book is written, the public, whether legal or lay, show their appreciation by demanding frequent new editions. This can well be said of the work under review, and upon glancing over it one is struck by the discrimination displayed by business men. Not overweighted with conflicting views upon controversial points, the Authors deal, in simple language, with matters connected with the every-day business of a Company Secretary. The arrangement is simple and complete, the Index is illuminating and carefully written; in fact, the work as a whole may be confidently recommended to all whose daily work brings them in contact with the machinery of our English Company law.

CONTEMPORARY FOREIGN LITERATURE.

Fahnenflucht und Verletzung der Wehrpflicht durch Auswanderung.
By LUDWIG BENDIX. Leipsic: 1906.

This is an exhaustive consideration of the legal position of the emigrant—especially the German emigrant to America—with regard to (1) military service in the old and new country; (2) crime and expulsion. The book is mainly a commentary on the Bancroft treaties of 1868, concluded between the United States and the North German Bund and other German States, a large part of the book being occupied with official documents. The English Aliens Act is not named. The subject-matter of the work is undoubtedly more important in Germany than in this country. With every young man who emigrates Germany loses a potential soldier.

Der Postscheck. By Dr. M. KIRSCHBERG. Leipsic: 1906.

A mass of official documents and statistics as to post-office orders in Germany, Austria, and Switzerland. There is a certain amount of law contained in the book, and in one place (p. 110), the English Bills of Exchange Act, 1882, is cited.

I Compiti della Filosofia di Fronte al Diritto. By A. RAVÀ. Rome: 1907.

This brochure seems to be an expansion of the fairly obvious statement that the science of law differs from natural science in having its data created by man. The task (*compito*) of philosophy is to recognise this.

 PERIODICALS.

Journal du Droit International Privé. 1906: Nos. VII—X. Paris.

This number contains some very interesting decisions. In *Hodgson-Pratt v. Dieudonné* (p. 1106), the Tribunal of the Seine held that a legacy to the President of the International Arbitration and Peace Association, for the money to be used on the Continent for promoting the cause of Peace, was valid by the law of France, although the plaintiff was personally unknown to the testator. In *Bapst v. Crown Exploration Co.* (p. 1130), it was held by the *Cour*

de Paris that it would enforce an English judgment by default, and would allow the plaintiff the usual English four per cent. on the sum due. The Court of Cassation of St. Petersburg (p. 1242) refused to relieve from legacy duty a gift made by a Russian subject to the Society of Psychical Research. The exemptions in favour of gifts to educational and scientific bodies only apply where such bodies are situated in Russia.

Zeitschrift für Internationales Privat-und Öffentliches Recht. 1906: Vol. XVI, pt. 5. Leipsic.

This part is entirely taken up with Russian civil procedure.

Deutsche Juristen-Zeitung. 1906: Oct. 15—Dec. 15. Berlin.

At p. 1137 is a curious discussion whether a type-writer is liable to an action for negligence whereby the employer incurs loss. The writer inclines to the view that in the absence of special circumstances the type writer is liable. At pp. 1192 and 1303 the legal aspects of the notorious Kopenick case are considered. Dr. Wegerdt of Dresden compares the English with the German procedure *in forma pauperis*, to the advantage of the former (p. 1314).

La Giustizia Penale. 1906: Sept. 27—Nov. 29. Rome.

At p. 1385 is an attempt to distinguish delict from contravention, the former being an offence against good in its proper entity, the latter being an offence against good in divergence from its surrounding conditions. The whole article is redolent of Italian legal metaphysics. There are two curious decisions as to the oath administered to the jury (pp. 1396 and 1500). It was held in the former case that the omission of the word *tutta*, in the latter that the omission of the word *pura*, did not make the oath null and void. "Truth," said the Court, "is one and indivisible, and the omissions, though regrettable, are of comparatively small importance as long as the important word *verità* is duly used." An interesting decision will be found on p. 1431. The appellant was found guilty of calumny, although the alleged crime of which he accused the respondent was one which by the dates would have been purged by prescription.

JAMES WILLIAMS.

WORKS OF REFERENCE.

Sweet and Maxwell's Diary for Lawyers for 1907. Edited by F. A. STRINGER and J. JOHNSTON.—This well-known annual, which has now reached its fifteenth edition, well maintains the high standard of previous issues. The contents appear to have received a careful revision, and have been brought up to date in accordance with the latest Rules. The County Court Fees, under the Treasury Orders of February and August 1906, have been duly noted, and the new scale of Fixed Costs in the King's Bench Division is included. All information likely to be of use to the lawyer is to be found within the pages of this Diary, and a good index greatly facilitates reference.

Who's Who, 1907. London: A. & C. Black.—The present issue of this important work of reference contains, we believe, more than 21,000 biographies. So comprehensive is the scheme of the work that it is well-nigh impossible to find any person at all entitled to be considered prominent in any particular sphere, whose biography is not included, and the fact that each of the biographies has been submitted for personal revision is surely a guarantee of the accuracy of the information given. A book so carefully compiled must be of immense value to all who have use for such a work.

Who's Who Year Book, 1907. London: A. & C. Black.—This is a very handy little work. Made up of the Tables which formerly were included in *Who's Who*, to which several new and original Tables have been added from time to time, it will be found an extremely useful book for ready reference; and the moderate price at which it is published, one shilling, places it within the reach of all.

The Lawyer's Remembrancer and Pocket Book, 1907. By A. POWELL, K.C. London: Butterworth & Co.—Lawyers will find this little book very useful, giving as it does much valuable information in a clear and concise form. Several new subjects are dealt with in the present, the tenth annual issue, amongst them being the Powers of the Court of Appeal; Security for Costs; Fixed Costs on Writs and Judgments; the Permitted Use of Adhesive Stamps.

Fry's Royal Guide to the London Charities. Edited by JOHN LANE. London: Chatto & Windus. 1907.—*Fry's Guide* is undoubtedly the first and best of its class, and has, we should think, done much to benefit the hospitals and general charities of the metropolis by bringing the claims of those institutions before persons having to deal with the administration and distribution of charitable gifts and bequests. The arrangement of the contents being alphabetical, reference thereto is an extremely simple matter, while the Index giving the charities under the heading of their respective classifications is a useful feature. Mr. Lane's Preface is as usual both interesting and instructive, and it is satisfactory to learn that the past year has been an exceptionally good one in the matter of bequests, etc., for charitable purposes.

Books received, reviews of which have been held over owing to pressure on space:—Frost's *Patent Law and Practice*; Matthews and Ball's *Emden's Building Contracts*; *Encyclopædia of the Laws of England*, Vol. 2; Morrow's *Building Cases*; Hudson's *Building Contracts*; Everest's *Law of Estoppel*; Craies' *Treatise on Statute Law*; Balfour Browne's *Essays: Critical and Political*; Paterson's *Licensing Acts*; Macmorran and Dill's *Local Government Act 1894*; *Yearly County Court Practice 1907*.

THE LAW MAGAZINE AND REVIEW.

No. CCCXLIV.—MAY, 1907.

I.—SOME RECENT COPYRIGHT DECISIONS.

IN the year 1900 the House of Lords came to a decision which seemed to astonish both the public and the legal profession. It turned on sect. 3 of the Copyright Act 1842. That section enacts that "the copyright in every book . . . shall be the property of (its) author." And the decision of the House of Lords which so astonished everybody was to the effect that under this enactment the thing in which the copyright exists, is the book, and the person who produces the book, is its author.¹ No wonder this decision was criticised and even ridiculed, for it assumed that for once in a time an Act of Parliament actually meant what it said.

The copyright, then, is in the book, not in the facts in the book, or in the ideas in the book, or in the literary expression of the facts and ideas in the book, but in the book itself. And the author of the book is not the person who unearths the facts or who thinks out the ideas or who gives literary expression to the facts and ideas, but the person who produces the book. The decision simplifies matters greatly, for everyone can tell what is meant by a book and by producing a book, but it is not so easy to say who unearthed the facts or thought out the ideas or gave

¹ *Walter v. Lane* (L. R. [1900], A. C. 539).

them literary expression, or, indeed, whether there are facts, ideas, or literary expression in a book at all.

The decision is obviously much too simple to be easily grasped by the legal mind, for we constantly hear lawyers declaring that "there is no copyright in news," "there is no copyright in ideas," &c. Even so distinguished a lawyer and judge as Joyce, J., is reported as declaring, "There is no copyright in news, but only in the manner of expressing it."¹ If his lordship will pardon me for saying so, there is no copyright even in the manner of expressing it. Copyright is not like a patent right. Two inventors working independently may be seeking after the same invention. The one who discovers and patents it first is entitled to the sole patent right in the invention. The other inventor may, unaware of the other's investigations, afterwards discover the same invention; but that will give him not the slightest property in it. But two authors working independently may produce two books expressed in precisely the same words. The fact that one has published his will not in the slightest degree prevent the other getting copyright in his. Every reporter who reports a speech has a separate copyright in his report—his book.² Every compiler who produces a directory has the copyright in his directory.³ Every mathematician who calculates a set of mathematical tables has the copyright in his tables.⁴ But this does not prevent other reporters, compilers or mathematicians, producing independently other reports, directories, and tables verbally identical and obtaining copyright in them. The copyright is not in the facts or in the ideas or in their expression; the copyright is in the concrete thing—the book. And whether another book constitutes an infringement of the copyright in it does not depend on the contents of the book, on the facts,

¹ *Springfield v. Thame* (89 L. T. 242, at p. 243).

² *Walter v. Lane*, *supra*.

³ *Kelly v. Morris* (L. R. [1866], 1 Eq. 697).

⁴ *Baily v. Taylor* (3 L. J., O. S., 66).

ideas or literary expression (if any) in the book; but whether the second book is, in fact, a literal or substantial copy of and from the first book or part of the first book.

Again, it is constantly said that an abridgment of a book is not a piracy of the book. The only authority I find given for this proposition is *Anonymous Case*, Lofft, 775, which somehow or other does not carry conviction to my mind. First, what is here meant by an abridgment? If one struck out every other sentence in a book (and sometimes that could be done not merely without detriment, but with advantage to the sense and literary merits of the work), that is an abridgment, but will any one say it is not also a piracy of the book? Surely the test whether one work is a piracy of another is not whether or not it is an abridgment of it, but whether or not, in the words of Lord Eldon adopted by Knight-Bruce, V.C., in *Dickens v. Lee*,¹ the second book "is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work."

And it is just in the application of this test of legitimate use that the difference in the nature of the contents of a book is of importance. A book of purely imaginative matter is intended merely to give intellectual pleasure in the reading; a book dealing with facts and news (which is simply recently reported facts—at least when it is not false) is intended to be used by its readers in the business and concerns of their lives. Again, the contents of the former are, or at any rate are assumed to be, entirely of the author's own invention, while the latter must in the nature of things consist largely of matter taken from sources open to the whole world, and a writer, in ordinary fairness, has more right to complain when another steals from him his own goods, than when another steals from him goods he himself has annexed. Lord Herschell refers to this distinction when he says, in

¹ 8 Jur. 183.

Leslie v. Young,¹ that while there is undoubtedly copyright in any compilation involving independent labour, still to constitute piracy of such a work there must be a substantial appropriation of the independent labour.

Another and more recent decision² seems again to have startled the public and legal profession, for the same reason that *Walter v. Lane* amazed them—the Court again boldly holding that an Act of Parliament actually meant what it said. It too turned on the 3rd section of the Copyright Act 1842. That section enacts that, when the author of an unpublished book is dead, the copyright in the book “shall be the property of the proprietor of the author’s manuscript from which such book shall be first published and his assigns.” On this enactment the Court (Kekewich, J., and the Court of Appeal) held that the owner of the prospective copyright in an unpublished book was the proprietor of the deceased author’s manuscript of it, and the person to whom he assigned such prospective copyright was his assign.

The decision was really only another illustration of the fact of which *Walter v. Lane* (*supra*) is the great exemplar—that the Copyright Act of 1842 is dealing not with abstractions, but with concrete things. Here it was contended for the defendants that by “proprietor of the author’s manuscript” must be meant the deceased author’s personal representatives, since it has, since Pope’s time, been recognised that an author or his personal representatives have a right to prevent the publication of unpublished letters at any rate, and that such right is of a proprietary character. What is meant by this is difficult to say. Copyright is the sole right or monopoly of multiplying copies of a published book—a positive right. The right of the author’s personal representatives is the right to prevent anyone publishing—that is making public—or making any other

¹ L. R. [1894], A. C. 335, at p. 341.

² *Macmillan & Co. v. Dent* (L. R. [1906] 1 Ch. 101; [1907] 1 Ch. 107).

improper use of unpublished letters, or, let us say, books — a mere negative right in gross which has no necessary connection with multiplying copies. Why, because the author's personal representatives have the one right, they should also be held to have the other it is impossible to understand. However, the short answer to the argument is that the Act says the copyright belongs to the owners of the deceased author's *manuscript*, and his personal representatives in this case did not attempt to exercise their right to prevent publication.

Another case may just be referred to. In *Ward, Lock & Co. v. Long*,¹ an author agreed with a publisher to write a book of a certain length, for a certain amount. When the book was finished, a dispute arose between him and the publisher as to whether the book was as long as it was required to be by the agreement. The author had at this time received the bulk of the contract price, but as the publisher refused to pay the rest, he took his manuscript over to a second publisher, and sold the copyright and assigned it in writing to the second publisher, who purchased it without notice of the author's dealings with the first publisher. The second publisher forthwith published the book. The judge (Keke-wich, J.), held, that whether or not the agreement came within sect. 18 of the Copyright Act 1842, it amounted to an equitable assignment of the copyright, which assignment was complete when the novel was written, though the whole contract price was not then paid; and he held that therefore the first publisher was the "assign" of the author within sect. 3. It is respectfully submitted that this decision is wrong. Assuming that the transaction with the first publisher amounted to an equitable assignment, the transaction with the second publisher was undoubtedly a legal one. Now it is a characteristic of an equitable assignment that it may be subsequently defeated by a legal assignment for

¹ L. R. [1906], 2 Ch. 550.

value to a purchaser without notice. Is there anything in the Copyright Act to suggest that the legislature intended to alter the nature of equitable assignments?

J. ANDREW STRAHAN.

II.—TRUSTS AND THE TRADE DISPUTES ACT.

WE have had in recent times a good deal of discussion as to the way in which Acts of Parliament are apt, at times, to fail in achieving the objects which their promoters had in view, and sometimes to produce results which are startling to those who were most concerned in passing them into law. The Trade Union Act 1871 was a good instance of this.

Those who were most active in promoting that measure had no idea that one of its results would be to enable Trade Unions to be sued in their registered names, just as if they were corporations. Yet this turned out to be the case. It is not improbable that a somewhat similar result may occur in the case of the Trade Disputes Act 1906.

As regards Trade Unions popularly so-called, *i.e.*, combinations of workmen, it may be interesting to watch the practical working of the immunity from legal proceedings intended to be conferred by sect. 4 of the Act. Lawyers will wait to see whether sub-sect. (i) really has the effect of preventing actions being brought to obtain injunctions against Trade Unions: and whether sub-sect. (ii) does really limit the immunity conferred to cases in which trade disputes are involved.

It may be that when these questions come to be judicially decided, the decisions will not be altogether what the promoters of the Act expect. But it is in relation to combinations of employers that the most unexpected results may perhaps come about.

Let me draw attention very shortly to the history of the Trade Disputes Act, in order to make clear how it comes to deal with combinations of employers at all. Before 1871 all combinations in restraint of trade were unlawful whether they were composed of employers or workmen.

By the Act of 1871 they ceased to be unlawful, and the statute dealt with combinations of employers and combinations of workmen alike, using general language applicable equally to either, on the assumption that these two kinds of combinations were really identical in nature.

But, in fact, the resemblance between them was only superficial. Both, it is true, were combinations of men engaged in trade, formed with the object of gaining in their trade that power which union brings. Broadly speaking, while combinations of workmen were formed to protect their interests *vis-à-vis* their employers, combinations of employers were formed to protect their interests *vis-à-vis* the public.

If this fundamental distinction is borne in mind it becomes easier to understand how legislation, using the same language in regard to each, may yet produce very different results in the one case to what it does in the other. But the great differences were overlooked, and the superficial resemblance between them, coupled with the fact that there are some few combinations of employers, such as the Shipping Federation, which exist to protect the rights of employers *vis-à-vis* workmen, caused the two kinds of combination to be again dealt with in identical language in the Trade Disputes Act 1906.

But whereas the Act of 1871 only removed pre-existing legal disabilities, the Act of 1906 conferred privileges and immunities not enjoyed by anyone else.

And when we come to examine the Act of 1906 we find that in practice the immunity given to a masters' combination is much more ample than that given to a workmen's combination.

This results from the curious way in which the fourth section of the Act is drawn. It begins by giving all Trade Unions complete immunity from all actions for wrongs they may have committed. Then by sub-section (ii) this is limited by leaving the Trade Union free to be sued through its trustees, in cases in which they could be sued under sect. 9 of the Act of 1871, "except in cases of trade disputes." The effect of this sub-section is not very clear, but it is unnecessary to consider precisely to what cases it applies, for it has no application at all to these masters' Trade Unions, and for this reason. Section 9 of the Act of 1871 applies only to registered Trade Unions, and masters' Trade Unions are not in point of fact registered. Registration is optional, and masters, having nothing to gain by it, leave it alone.

It follows, then, that while sub-sect. (ii) limits the immunity conferred on workmen's Trade Unions, which are almost all registered, a combination of employers that comes within the definition of a Trade Union is completely exempt from actions of tort, at any rate actions to recover damages for torts.

The next thing, then, to consider is:—What combinations of employers come within the definition?

By sect. 16 of the Trade Union Act 1876, a Trade Union is defined as meaning "any combination whether temporary or permanent for regulating the relations between . . . masters and masters, or for imposing restrictive conditions on the conduct of any trade or business."

It is to be observed that it is in no way limited to combinations aiming at some restriction on the conditions upon which labour shall be employed. A combination not to sell a ton of coal under 20s. is within it just as much as a combination not to pay more than 20s. a week wages. Is there, then, any limit to the extent to which traders may combine in conducting their trade in such a way as to

gain for the combination so formed the privileges conferred by the Trade Disputes Act?

It would seem that the only limitation is that imposed by sect. 4 of the Companies Act 1862, which provided that "no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any . . . business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered as a company under this Act."

This leaves any body of masters numbering not more than twenty absolutely free to form any kind of combination they please for regulating the relations between themselves, and the combination so formed will be a Trade Union. And of the combinations of masters numbering more than twenty, only those are prohibited which "carry on a business that has for its object the acquisition of gain."

This has been interpreted to mean¹ that the company, association or partnership, must itself do a succession of acts having the acquisition of gain for their object; it has therefore no application to a combination working under agreements, which merely provide that no member of the combination shall buy over or sell under a price to be fixed by a committee appointed by the members of the combination, or to a combination by which the output of each member was limited in a similar manner. Generally speaking, then, a Trade Union may consist of any number of employers bound to each other by restrictive covenants.

Let us now turn to what is known as a "Trust" in America, and see how far it would come within the definition of a Trade Union in this country.

The expression "Trust" is one of those vague general terms in which the public delight, but which elude those

who endeavour to give them any exact definition. Strictly speaking in this connection, a "Trust" should mean a business managed or controlled by trustees for the benefit of beneficiaries, but it has come to mean any business carried on in such a way, or on such a scale, as to create a partial or complete monopoly.

Originally there were two methods of establishing a "Trust" in the United States :—

- (i) By restrictive agreements controlling the several members of a combination of manufacturers or traders, so as to ensure complete uniformity of action in carrying on the trade, and an entire cessation of competition among them :
- (ii) By the purchase of as many shares in the various corporations of which the trust is to be composed as will give the trustees, in whose hands the shares so purchased are deposited, the mastery over such corporations :

the trustees thereby getting a complete control over their business, and causing it to be carried on so as to do away with any competition between them. Both these forms of Trust have been repeatedly declared illegal in the United States, as being combinations in restraint of trade, and having nothing corresponding to our Trade Union Act 1871 to protect them, the Trusts in that country have been driven to the—to them—inconvenient method of forming single corporations to control the different industries.

Now the first of these forms of trust is exactly what the English law knows as a Trade Union. It was at the Common law unlawful as being in restraint of trade. It was exactly what was hit at by the leading case of *Hilton v. Eckersley*.¹ In that case the combination happened to be one formed in answer to combinations composed of the

¹ (1856) 6 E. & B. 47.

workmen in the employment of the firms who combined together; but this circumstance was quite immaterial—the judgment would have applied in exactly the same way if the object had been to eliminate competition instead of to combat a workmen's Trade Union.

There are many reported cases in the American Courts in which the constitution of Trusts of this kind may be found described.¹ In all these cases the combinations were declared illegal; and not only have the American Courts consistently striven to prevent their formation, but the Congress of the United States has legislated against Trusts in general in language of unusual violence, though with little practical result.²

It is curious, then, to note that one of these Trusts, worn out by a long struggle with the law in the land of its origin, would, on its arrival in the United Kingdom, find itself welcomed, not only as a lawful, but as a cherished and privileged institution. It could spread libels broadcast about its trade competitors, it could hire men to obstruct their premises, it could bribe those who had contracts with them to break them, it could use any means it might please to effect their ruin, without one penny of damages becoming recoverable against it.

It would have been difficult to have devised any more effective inducement to "Trusts" to establish themselves

¹ COMBINATIONS OF COAL-OWNERS :—

Morris Run Coal Co. v. Barclay Co. (68 Penn. St. 173).

Arnot v. Pitston & Elmira Coal Co. (68 N. Y. 558).

COMBINATION OF SALT-OWNERS :—

Central Salt Co. v. Guthrie (35 Ohio St. 666).

COMBINATION OF GRAIN DEALERS :—

Craft v. McConoughy (79 Illinois 346).

COMBINATION OF INDIAN BAGGING MANUFACTURERS :—

India Bagging Association v. Kock (14 La Ann. 168).

COMBINATION OF LUMBER MANUFACTURERS :—

Santa Clara Mill Co. v. Hayes (76 California 387).

² See the Sherman Anti-Trust Act 1890.

in this country than that now held out to them. Complete immunity from actions for wrongs is one of the things that has always been sought for—it has been reserved for the twentieth century to give it to the great combinations of capitalists known as Trusts.

D. F. PENNANT.

III.—DOMICIL.

IT may be conceded as a fact that no definition of domicile yet made has given anything but dissatisfaction to the judges. As Lord Chelmsford said as long ago as 1863: "The difficulty of getting a satisfactory definition of domicile which will meet with every case has often been admitted, and every attempt to frame one has hitherto failed."¹ And the Lord Chancellor, in *Bell v. Kennedy*,² said: "I do not think it will be necessary to examine the various definitions which have been given of the term 'domicil.'" In the latest case on the subject, *Marchioness of Huntly v. Gaskell*,³ which was an appeal from Scotland, no attempt to define domicile was made by the Lord Chancellor or by any of the noble and learned Lords of Appeal in Ordinary. The domicile of any person, it is submitted may be said to be the place or country which is in fact his permanent home, or the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law. Whenever a person's home is under consideration, reference is intended to be made to a connection between two facts, the one a physical fact, the other a mental fact. The former is the person's "physical presence," or residence within a particular place or country. The latter is the present intention to reside permanently, or for an indefinite period, within such particular place or

¹ *Moorhouse v. Lord*, (10 H. L. C., at pp. 284, 285).

L. R. [1868], 1 Sc. App., at p. 311.

² L. R. [1906], A. C. 56.

country, or rather, the absence of any present intention on his part to remove his dwelling permanently, or for an indefinite period, from such place or country. This latter is called the *animus manendi*, or intention of residence, which also includes the absence of any present intention not to reside permanently in a place or country. The word "residence" has been employed by the judges to denote a person's habitual physical presence in a place or country which may or may not be his home.¹ The amount of residence is immaterial; a person may have resided in a place for a few weeks or for months or years. But what is material is the moment when there exists the required combination of residence, and the *animus manendi*; that country is then his home. As Lord Chelmsford said, in *Bell v. Kennedy*:² "It may be conceded "that if the intention of permanently residing in a place "exists, residence in that place, however short, will establish a domicile." Domicil is acquired *facto et animo*, that is by the combination of actual residence, and of intention to continue residence. So, after acquisition, it is lost or abandoned, only when both the residence and the intention to reside cease to exist. Suppose A., who has resided in England as his home, continues either to reside there in fact, or to retain the intention of residing there permanently, England continues to be his home. But if A. both ceases to reside in England, and to have the intention of residing there permanently, England is no longer his home. Is it possible for a person to be homeless? Suppose A., an English emigrant, having left England for good, sails for America, where he intends to settle.* He has lost his English home, and has not acquired his American home. A. is certainly homeless. So, too, is a wandering gipsy, who has no intention of permanently residing in one place. There is no *animus manendi* here. That a person may have two homes is also very

¹ See *Jopp v. Wood* ([1865], 34 L. J. (Ch.), 212, 218; *Gillis v. Gillis* [1874], 1. R., 8 Eq. 597).

² L. R. [1868], 1 Sc. App. 307, 319.

clear. A. may have made up his mind to live six months of each year in France and six months in London. He owns a house and lands, and has friends in each place. In winter he resides in France, during spring, and in the season in London. He permanently intends to do this all his life, that is, he has the *animus manendi*, then A. most certainly has two homes. The facts here are similar to those in the *Marchioness of Huntly v. Gaskell (supra)*. A., whose domicile of origin was English, had his chief residence or home in Scotland for thirty years prior to his death. During this time he retained his interests in England as principal partner in a private bank at Manchester, and as proprietor of large landed estates, and continued his occupancy as tenant of a mansion-house near Manchester and of a house in London. He left very large personal estate and a will in English form, made a short time before his death, in which he was designated as of Manchester. He also made a will in Scottish form. Apart from making his home in Scotland there was nothing in his conduct to suggest any intention of abandoning his English domicile:—*Held*, affirming the First Division of the Court of Session and the Lord Ordinary (Low), that he had not lost his English domicile.¹ This case raised the same point as to domicile, but was a claim by the widow, Lady Brooks, for *jus relictæ*, and was heard first in the Court of Session. That the case disclosed no new point in the law of domicile is clear from the judgments of the Lord Chancellor, Lord Robertson, and Lord Lindley, and it is doubtful if the case ought ever to have been taken to the House of Lords, as the appeal was dismissed by the House of Lords on the appellant's argument, and the respondent's counsel were not called upon. The Lord Chancellor said, at p. 66, that the case turned upon a very small point, and that "I myself have not been from the
" first able to entertain the smallest doubt that the judgment

¹ See *Brooks v. Brooks' Trustees*, 4 F. 1014.

“ of the Lord Ordinary, in the first instance, and the “ Inner House afterwards, was perfectly correct.” And after quoting with approval the words of Lord Curriehill, in *Donaldson v. McClure*,¹ on change of domicile, proceeded to say (p. 67), “ . . . applying that principle to the question “ now before your Lordships, I say that I regard with some- “ thing like amazement the fact that the question should “ have been debated so long under the circumstances which “ are in proof before your Lordships.” And again (p. 69), “ For my own part I cannot entertain the smallest doubt that “ from that moment he had satisfied himself that he was, as “ he intended to be, an Englishman, and retained his Eng- “ lish domicile. Under those circumstances it appears to me, “ notwithstanding the enormous length to which this case “ has gone, that there is a very plain and obvious answer to “ the appellant’s case.” And Lord Robertson, at p. 71, said, “ It seems to me that this attempt to turn a strenuous “ English banker and great landed proprietor into a Scotch- “ man is, on the face of the broad facts, hopeless. The good “ sense, as well as the law of the matter were, as has been “ mentioned by my noble and learned friend on the wool- “ sack, expressed by Mr. Wood in answer to what clearly “ was the alarmed inquiry of Sir William, ‘Am I a domi- “ ciled Scot?’ ‘No; your domicile of origin is English.’ “ ‘Although you have a residence in Scotland, you have not “ ‘abandoned your English domicile.’ . . . ‘I think it “ ‘wholly unnecessary once more to examine the authorities “ ‘on the law of domicile, as the facts of this case do not “ ‘come near any question of delicacy. I have only to add “ ‘an expression of regret that the parties should have “ ‘brought on themselves such enormous expense by ex- “ ‘ploring and presenting minute and complicated details “ ‘when the broader facts are conclusive.’” I have not deemed it necessary to go into the exhaustive judgment of the Lord President, in *Brooks v. Brooks’ Trustees*,² because

¹ [1857], 20 D. 307.

² [1902], 4 F. 1014.

the noble and learned Lords in the House of Lords (the Lord Chancellor, Lords Robertson and Lindley) were unanimous in holding that the case disclosed no new point in the law of domicile—as Lord Robertson said (p. 71), “The facts of this case do not come near any question of “delicacy”—and in deploring the fact that the case was ever taken to the House of Lords. The Lord Chancellor and Lord Robertson, in their judgments, animadverted very severely indeed on this. A more difficult question arises when the act of abandonment of an old home and the act of acquisition of a new home do not simultaneously occur. If the former precedes the latter, it is conceivable that a man might be homeless in these circumstances. For example, A. leaves England with the intention of abandoning England as his home, and sails for America *viâ* China, and intending to visit various other countries *en route*. From the time when he left England, A. had certainly lost his English domicile—*facto et animo*—and during his voyage round the world had no domicile, as his American domicile would not begin until he had arrived in that country. A., *pro tem.*, is homeless, and without a domicile in the eye of the law. The difficulties attending this question of the abandonment of one home and the acquisition of another were illustrated in the case of *Bell v. Kennedy*.¹ The question was whether A., who at one time lived in Jamaica, and possessed a home there, had or had not in the year 1838 acquired a home in Scotland. It was admitted that in 1837 A. had left Jamaica for good, and was residing in Scotland, and also that subsequently to 1838 he had acquired a Scotch domicile. The question was whether A., at the date in question, had made up his mind to reside permanently in Scotland. At the trial A. gave evidence himself as to what his intentions were in 1838, but although his *bonâ fides* was undoubted, the House of Lords took a different view from that taken by

¹ L. R. [1868], 1 Sc. App. 307.

A. himself, of what was then his intention as to residence, chiefly because of letters he had written in 1838 (pp. 314, 315):—*Held*, unanimously (reversing the Second Division of the Court of Session), that A., when his wife died, had not lost his domicil of origin in Jamaica, and not having acquired a domicil in Scotland, the question as to *communio bonorum* did not require examination. The Lord Chancellor said, at p. 310, “The law is, beyond all doubt, clear with regard to the domicil of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired.” “There” (referring to Jamaica), as Lord Cranworth tersely put it (p. 318), “he set up his *lares*.” Lord Westbury said, at p. 320, “What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicil of origin adheres until a new domicil is acquired.” Where an Englishman resided many years at Hamburg under circumstances which afforded evidence of a domicil there, and then made a will in England, where he was then on a visit, in which he declared it was not his intention to renounce his domicil of origin as an Englishman, it was *held*, that a mere declaration of intention was immaterial to the question when he had, in fact, acquired a foreign domicil.¹

In *Craignish v. Hewitt*,² the Court of Appeal (Lindley, Bowen and Kay, L.JJ.), *held*, affirming Chitty, J., that the plaintiff, whose domicil of origin was Scotch, had, during the marriage, acquired by choice a domicil in England, and that the domicil so acquired continued until his wife's death. A married woman may have her domicil in one country, though she has her real home in another, because by law a married woman is always domiciled in the country where her husband has his domicil. The English Courts may, on

¹ *Re Stern* (28 L. J., Ex. 22; 3 H. & N. 594).

² L. R. [1892], 3 Ch. 180.

account of the character of the country in which a man has his home and has resided, refuse to treat such a country as his domicile. In the case of *In re Tootal's Trusts*,¹ an Englishman resided at Shanghai with the intention of residing there permanently, and without any idea of returning to England. He died at Shanghai. He had at the time of his death a home in China. It was held, however, by Chitty, J., that his domicile was English, and that English subjects resident in China cannot acquire in China a domicile similar to that existing in India, and commonly known as Anglo-Indian. In *Steel v. Steel*,² which was a husband's action of divorce against his wife upon the ground of desertion, and which was met with the plea of no jurisdiction, founded upon the allegation in point of fact that he was not a domiciled Scotsman. A. was born in Scotland, and in 1857 went to Rangoon, Burmah, and became a partner of a firm of merchants there. Thereafter he paid occasional visits to this country, and in 1873 he formed in London a branch of a new business which he had started in Rangoon, and lived in London down to 1887. His wife left him in 1884. In 1887 he took a lease of a castle in Scotland and went to reside there. *Held*, that the pursuer had not lost his domicile of origin, and that therefore the Court had jurisdiction in the cause. It is difficult to follow the Lord President when he says, at p. 909, "Now the notion of an Anglo-Indian domicile has no application in this kind of case at all. Why an Anglo-Indian domicile should be suggested for a Scotchman I do not know." The phrase "Anglo-Indian" is a term of art in law, and of course applies to an Englishman, Scotchman, or Irishman, who goes out to India in the service of the East India Company. The phrase "Scoto-Indian," which the Lord President uses, is one quite unknown in legal terminology. Moreover, twenty-five years before *Steel v. Steel*, in the House of Lords,

¹ [1883], 23 Ch. D. 532.

² [1888], 15 R. 896.

Lords Cranworth and Chelmsford themselves, in *Moorhouse v. Lord*, admitted the Anglo-Indian domicil of a Scotchman who had gone out to India in the civil service of the East India Company;¹ and in *Allardice v. Onslow*² Kindersley, V.-C., decided in favour of the Anglo-Indian domicil of a Scotchman who went out to India for private speculation. So in *Munroe v. Douglas*³ held, that a Scotsman, having acquired an Anglo-Indian domicil, and having finally quitted India, but not having settled elsewhere, did not re-acquire his original domicil (referred to by the Lord Chancellor in *Udny v. Udny*, at p. 448). Lord Watson, in delivering the judgment of the Privy Council in *Abd-ul-Messih v. Farra*,⁴ says, at p. 440, "The latter is altogether independent of political status; it arises from residence in India, and has always been held to carry with it the territorial law of that country, whether under the Empire of the Queen or under the previous rule of the East India Company, which the Courts of England treated in questions of domicil as an independent government." In the same case it was held that there is no such thing as domicil arising from society and not from connection with a locality; consequently, as Cairo was not a British possession, governed by English law, the testator's permanent abode therein under British protection did not attract to him an English or Anglo-Egyptian domicil. See, however, *Abd-ul-Messih v. Farra*.⁵ There is a difference and a distinction between a person's home and his domicil. The latter is the name for a legal conception, certainly based upon the idea of home, but containing in it elements and ingredients of a purely legal character. It is a question of fact whether a place or a country is a man's home. It is a mixed question of law and fact whether a particular place or country is a man's domicil. It is not necessary to have some particular spot

¹ 10 H. L. C. 281, 284. ² [1864], 10 Jur., N. S., 352. ³ 5 Madd. 379.

⁴ L. R. [1888], 13 App. Cas. 431.

⁵ L. R. [1888], 13 App. Cas. 431.

in a particular country in order to make a domicil.¹ See, however, the judgment of Chitty, J., in *In re Patience*.² It is trite law that no one can at any time be without a domicil.³ A domicil once acquired is retained until it is changed (1) in the case of an independent person by his own act: (2) in the case of a dependent person by the act of some one on whom he is dependent. By the law of England dependent persons are divided into two classes, (1) minors, (2) married women.

Acquisition and Change of Domicil.—Domicil of Independent Persons.—Every independent person has at any given moment either (1) the domicil received by him at his birth, *i.e.*, the domicil of origin, or (2) a domicil acquired or retained by him while independent by his own act, called a domicil of choice. Every independent person has either the domicil which he received at birth, that is, the domicil of origin, or a different domicil which he acquired of his own free will after attaining majority called a domicil of choice. An independent person cannot therefore be without one domicil or the other. The rule of law is, that a person *sui juris* who at any given time has no other domicil, is assumed to have his domicil of origin. The main points of distinction and difference between the two domicils are these: (1) their mode of acquisition; (2) the mode in which they are changed.

Domicil of Origin.—Every person receives at birth a domicil of origin. (1) The domicil of origin of the child is that of the father at the date of the child's birth,⁴ that is, in the ordinary case—in the case of legitimate children. (2) If the child is illegitimate,⁵ or posthumous, the domicil of

¹ Per Lord Jeffrey, in *Arnott v. Groom* ([1846], 9 D. 142, at p. 150).

² L. R. [1885], 29 Ch. D. 976, 984.

³ *Udny v. Udny* (L. R. [1869], 1 Sc. App. 441, 453, 457); *Bell v. Kennedy* (L. R. [1868], 1 Sc. App. 307).

⁴ *Udny v. Udny* (L. R. [1869], 1 Sc. App. 441); *Dalhousie v. McDouall* ([1840], 7 Cl. & F. 817).

⁵ *Re Wright's Trusts* ([1856], 2 K. & J. 595; 25 L. J. (Ch.), 621); Lord Westbury, in *Udny v. Udny* (L. R. [1869], 1 Sc. App. 457); *Urquhart v. Butterfield* (L. R. [1887], 37 Ch. D. 357).

origin is the domicile of the mother at the time of birth. (3) In the case of a foundling, the country where he or she is born or found is the domicile of origin. (4) In the case of a person legitimated *per subsequens matrimonium* of its parents, as in the law of Scotland, the domicile of origin, it is submitted, is the domicile which its father had at the time of its birth. The well-known words of Lord Westbury in the House of Lords, in *Udny v. Udny*,¹ may be quoted here: "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. . . . It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate." In *Udny v. Udny*, *supra*, the question was whether a child, whose father was Scotch, and whose mother was French, and who was born at Camberwell in 1853, his parents then being unmarried, was legitimated *per subsequens matrimonium* of his parents in Scotland in 1854. The difficulty was as to the domicile of Colonel Udny at the date of the respondent's birth in 1853. *Held*, by the House of Lords (aff. the Second Division of the Court of Session), that Colonel Udny's domicile of origin was Scotch, and that he had never altered or lost it, notwithstanding his long absences from Scotland, and that his son, the respondent,

¹ L. R. [1869], 1 Sc. App. 441, 457.

though illegitimate at birth, was legitimated by the subsequent marriage of his parents.

The place of the birth of the respondent is immaterial, the domicile being Scotch. In *Dalhousie v. McDouall*¹ and *Munro v. Munro*² the birth of the illegitimate child, and also the subsequent marriage of the parents took place in *England*, but the domicile being Scotch it was held that neither the place of the marriage nor the place of the birth affected the *status* of the child. The case of *Ross v. Ross*³ was insisted upon by the appellant (who appeared in person) in *Udny v. Udny*; but it clearly had no application, because there the parties were domiciled in *England*, the child was born in *England*, the parties went to *Scotland* expressly for the purpose of being married, and having been married they returned to *England* to the place of their former domicile. In the case of *The Indian Chief*,⁴ the question was whether a ship was the property of a British subject, for if so her trading was illegal. The owner averred that he was an American, and it was held that he was, but that having come to *England* in 1783 and remained till 1797, he had become an English merchant. But he left *England* before the capture of the vessel, and letters were produced showing his intention to return to *America*, which he did not reach until after. Held, "that from the moment he turned his back on the country where he had resided on his way to his own country, he was in the act of resuming his original character, and is to be considered an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*." As the Master of the Rolls (Arden) said, in *Somerville v. Somerville*:⁵ "The domicile of origin is that arising from a man's birth

¹ 7 Cl. & F. 817.

² *Ibid.*, 872.

³ 4 Wils. & Shaw 289.

⁴ 3 Rob. Adm. 12.

⁵ [1801], 5 Vesey 749a, 786, 787.

“and connections,” *i.e.*, it is fixed by the domicile of the parent at the time of the child's birth. (2) In the case of an illegitimate or posthumous child it is the domicile of origin of the mother at the time of its birth, that is its domicile of origin. For example, A. is born in France of parents who are not married, the father being an Englishman and the mother a Frenchwoman, each domiciled in their respective countries. A.'s domicile of origin is French. *Re Wright's Trusts*.¹ (3) In the case of a foundling it is to the country where it is born or found that the law ascribes its domicile of origin. (4) In the case of a child legitimated *per subsequens matrimonium* of its parents, where such legitimation is legal, as by the law of Scotland, as such a child is thereby put in the same position as if he had been born legitimate, his domicile of origin is apparently that of his father at the time of the child's birth.²

Domicil of Choice.—Every person who is *sui juris* can acquire a domicile of choice by the combination of residence, and intention of permanent or indefinite residence, *i.e.*, *factum* and *animus manendi*.³ (1) *Mode of Acquisition*. After infancy, every person may acquire a domicile by his own act and will, a domicile different from his domicile of origin, called a domicile of choice. “Domicil of choice,” as Lord Westbury said, in *Udny v. Udny*, *supra*, p. 458, “is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be residence

¹ [1856], 25 L. J. (Ch.), 621; 2 K. & J. 595.

² See *Vacher v. Solicitor to Treasury*; *In re Grove* (L. R. [1888], 40 Ch. D. 216).

³ *Udny v. Udny* (L. R. [1869], 1 Sc. App. 441, 457, 458); *Bell v. Kennedy* (L. R. [1868], 1 Sc. App. 307, 450); *Collier v. Rivaz* ([1841], 2 Curt. 855); *Maltas v. Maltas* ([1844], 1 Rob. Ecc. 67, 73); *Forbes v. Forbes* ([1854], 23 L. J., Ch. 724); *Haldane v. Eckford* (L. R. [1869], 8 Eq. 631); *Hoskins v. Matthew* ([1856], 25 L. J., Ch. 689); *Jopp v. Wood* ([1865], 34 L. J., Ch. 212).

“freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established.” In *Fairbairn v. Neville*,¹ the facts were: S., a young Englishman, in 1865, came to Scotland, having received a permanent appointment in the Branch Post Office at Edinburgh. In 1858, he married a Scotch girl, whose father lived at Edinburgh, and entered into a marriage contract with her in Scotch form. Several children were born of the marriage. In 1876 he purchased a house at Portobello, near Edinburgh, where he had resided. In 1878 he retired on a pension, and continued to live in said house until his death, in 1895. A few years after he came to Scotland he inherited from his father a property, in Westmoreland, worth about £100 a year, and he frequently spent his holidays there, visiting it, after he had retired, twice or thrice annually. The question was, what was S.’s domicile in 1863? *Held*, by the First Division of the Court of Session, that S. had, prior to 1863, acquired a Scotch domicile of choice, and retained it until his death in 1895. Lord Robertson said, p. 203): “. . . if the conditions of a public appointment, or of a private employment, lead a man to resolve permanently to settle in the country where he holds his appointment, it is not the reason of his decision, but his decision, that determines his domicile. To say that he dislikes his fate, and would prefer to live elsewhere, is nothing to the purpose. A man’s decision about his

¹ [1897], 25 R. 192.

“own career is in many cases opposite to his preference; but it is his decision, and not his preference, that governs his domicil.” As Lord Chelmsford said, in *Udny v. Udny*,¹ “A change of [the domicil of origin] can only be effected *animo et facto*—that is to say, by the choice of another domicil evidenced by residence within the territorial limits to which the jurisdiction of the new domicil extends.” And Vice-Chancellor Kindersley expressed the law very clearly in *Cockrell v. Cockrell*,² when he said: “The only principle which can be laid down as governing all questions of domicil is this, that where a party is alleged to have abandoned his domicil of origin, and to have acquired a new one, it is necessary to show that there was both the *factum* and the *animus*. There must be the act, and there must be the intention.” “The question of domicil is a question of fact and intention.”³ (1) *Residence*.—The residence which goes as an element to constitute domicil need not be long, but it must be in pursuance of the intention. Mere length of residence alone does not constitute domicil.⁴ A. was born in Scotland in 1792, and for the last 22 years of his life he resided in lodgings, hotels and boarding-houses, in various places in England. From the year 1810 till his death in 1882 he never revisited Scotland, and from 1860 till the date of his death he was never outside of the territorial limits of England. Held, by Chitty, J., that A.’s domicil at his death was Scotch. (2) *Intention*. (a) The *animus* must amount to a purpose or choice. “The domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place.”⁵ And as the Master of the Rolls (Jessel) said, in *King v. Foxwell*:⁶ “In order that a man may

¹ [1869], L. R., 1 Sc. App. 441, 449.

² [1856], 25 L. J. (Ch.), 730, 731.

³ Wilde, in *Attorney-General v. Kent* ([1862], 31 L. J. (Ex.), 391, 393).

⁴ *In re Patience* (L. R. [1885], 29 Ch. D. 976).

⁵ *Udny v. Udny* ([1869], L. R., 1 Sc. App. 441, 458, per Lord Westbury).

⁶ L. R. [1876], 3 Ch. D. 518, 520.

“change his domicile of origin he must choose a new domicile —the word ‘choose’ indicates that the act is voluntary on his part.” It would appear that a person may change his domicile, although his object in doing so is to defeat his creditors.¹ There are important *dicta* of Baron Bramwell, in *Attorney-General v. Pottinger*,² with regard to the question of intention. (b) The intention must be an intention to reside permanently, or for an indefinite period. The statement in Fraser’s *Husband v. Wife*,³ that a person cannot change his domicile unless he has the intention to change his civil status is clearly inaccurate. It is merely another way of saying that a person cannot change his domicile unless he intends *quatenus in illo exuere patriam*, which doctrine has been repeatedly rejected by the House of Lords. The intention must be “an intention of continuing to reside for an unlimited time.”⁴ Residence, minus intention, in a foreign country for twenty years will not change a person’s domicile.⁵ (c) The intention must be such as to involve abandonment of the former domicile.⁶ (d) The intention need not necessarily be an intention to change allegiance. The doctrine of *Moorhouse v. Lord*⁷ has been questioned and doubted in *Udny v. Udny*:⁸ and in *Brunel v. Brunel*,⁹ and said to have been dismissed in the House of Lords by the judgment of Lord Macnaghten, in *Winans v. Attorney-General*.¹⁰ There his Lordship referred to *Munro v. Munro*,¹¹ *Udny v. Udny*,¹² *Bell v. Kennedy*.¹³ The headnote in *Moorhouse v. Lord* is, “In order to lose a domicile of origin, and to acquire a new

¹ *In re Robertson* (W. N., 1885, p. 217).

² [1861], 30 L. J. (Ex.), 284, 292.

³ Second Ed., p. 1265.

⁴ *Udny v. Udny* ([1869], L. R., 1 Sc. App. 441, 458, per Lord Westbury); *The Lauderdale Peerage Case* (L. R. [1885], 10 App. Cas. 692).

⁵ *Jopp v. Wood* ([1864], 34 L. J. (Ch.), 212).

⁶ *Lyall v. Paton* ([1856], 25 L. J. (Ch.), 746, 749).

⁷ [1863], 32 L. J. (Ch.), 295, 298; 10 H. L. C. 272.

⁸ L. R. [1869], 1 Sc. App. 441.

⁹ L. R. [1871], 12 Eq. 298.

¹⁰ L. R. [1904], A. C. 287.

¹¹ [1840], 7 Cl. and F. 842.

¹² L. R. [1869], 1 H. L. Sc. 455, 876.

¹³ L. R. [1868], 1 H. L. Sc. 321.

“domicil, a man must intend *quatenus in illo exuere patriam*. “It is not enough for him to take a house in the new “country, even with the probability and belief that he “remain there all the days of his life. Change of residence “alone, however long and continued, does not affect a “change of domicil as regulating the testamentary acts of “the individual. There must be an intention to change “the domicil.” The doctrine of *Moorhouse v. Lord* is that a domicil of choice, even in a Christian country, is not acquired by any residence, however permanent, unless the person in question has the intention of subjecting himself and his movable succession to the law of that country, or at least, if he does not think expressly of the law, the intention of so incorporating himself with the population of that country that the application of its law to him and to his movable succession must be considered to be in accordance with his feelings. If A. leaves this country and proceeds to Canada, his domicil is thereby changed if he intends to settle there and to make his home there, and it is immaterial whether he considered what the legal consequences of his so doing would be.¹ The mere desire to retain a domicil in one country will not enable a person to do so if, in point of fact, he resides with the *animus manendi* in another.

Change of Domicil.—(1) The domicil of origin is retained until a domicil of choice is in fact acquired; (2) A domicil of choice is retained until it is abandoned; whereupon either (a) a new domicil of choice is acquired; or (b) the domicil of origin is resumed. A domicil cannot be changed by any residence not resulting from a choice immediately applied to the residence, *e.g.*, not by lying in prison,² not by 22 years’ actual residence in another country, in lodgings, hotels and boarding houses, in different places, with no clear

¹ See passages in the judgment of Wickens, V.-C., in *Douglas v. Douglas* ([1871], 12 Eq. 617, 643, 644).

² *Burton v. Fisher* ([1828], M. 183).

intention of making a home there.¹ Long residence in this country by an American citizen did not effect a change of domicile. A., an American citizen, left the United States and lived many years in England, where he died, leaving by will a legacy on which the Crown claimed legacy duty, on the ground that the testator had acquired a domicile in England:—*Held*, reversing the Court of Appeal, that the *onus* of showing a change of domicile was upon the Crown, and (Lord Lindley dissenting) that the proof of a fixed and settled purpose was not clearly made out, and that legacy duty was not payable.² This case followed the *Lauderdale Peerage Case*,³ *Udny v. Udny*,⁴ and *Bell v. Kennedy*,⁵ in deciding that the *onus* lies upon those who assert that a domicile of origin has been lost, and that some other domicile has been acquired. The domicile of origin is changed by residence, and intention of abandoning the domicile of origin, together with the *animus manendi*. *The Lauderdale Peerage Case*,⁶ *Douglas v. Douglas*,⁷ *Haldane v. Eckford*,⁸ *De Bonneval v. De Bonneval*.⁹ This change must be *animo et facto*, and the *onus probandi* is on the person who asserts that the change has taken place. This was well shown in *Bell v. Kennedy*.¹⁰ There the facts were the following: A., who was of Scotch extraction, had a domicile of origin in Jamaica. In 1837, after he came of age, he sold his property there, and left the place for good. He then returned to this country, and went to Scotland, and was resident there during 1838, but had not made up his mind to settle in Scotland. The question was whether A. in 1838 was, or was not, domiciled in Scotland. The Court of Session *held* that he had at that time acquired a Scotch domicile, but this view was rejected by the House of Lords, who held that A.'s domicile of origin still existed.

¹ *Patience v. Main* (L. R. [1885], 29 Ch. D. 976).

² *Winans v. Attorney-General* (L. R. [1904], A. C. 287).

³ L. R., [1885], 10 App. Cas. 692.

⁴ L. R., 1 H. L. Sc. 441.

⁵ 1 H. L. Sc. 307.

⁶ L. R., 10 App. Cas. 692.

⁷ L. R., 12 Eq. 617.

⁸ L. R., 8 Eq. 631.

⁹ 1 Curt. 864.

¹⁰ L. R. [1868], 1 Sc. App. 307.

Although resident in Scotland, he had not the *animus manendi*.

(2) *Resumption of domicile of origin*. A person in possession of a domicile of choice may abandon it, and at the same moment, resume his domicile of origin. So a person may abandon a domicile of choice in one country without in fact acquiring a home in another. As Lord Chelmsford observed, in *Udny v. Udny*, *supra*: "The domicile of origin always remains, as it were, in reserve, to be resorted to in case no other domicile is found to exist." In *Udny v. Udny*, which is the leading case on the change of domicile, and taken together with *Bell v. Kennedy*, *supra*, contains nearly the whole of the law on the subject, shortly put, the facts were—A.'s domicile of origin was Scotch. He settled in England, and acquired there a domicile of choice; he then left England and went to reside at Boulogne, without, however, intending to settle in France:—*Held*, by the House of Lords, that A. resumed his Scotch domicile of origin at the moment when he left England. *Domicile of Dependent Persons*—*i.e.*, Infants and Married Women. The domicile of such is the same as, and changes with, that of the person on whom they are legally dependent. (1) The domicile of a legitimate minor is the same as that of its father.¹ (2) The domicile of an illegitimate minor is, whilst the minor lives with its mother, the same as the domicile of the mother.² (3) The domicile of a minor without living parents is possibly that of its guardian.³ A mother or guardian has no power to change the domicile of a minor when that is done for a fraudulent purpose, *e.g.*, to affect detrimentally the distribution of a minor's estate in case of his death.⁴ The domicile of a married woman is, during coverture, that of her

¹ *Somerville v. Somerville* ([1801], 5 Ves. 749a); *Sharpe v. Crispin* (L. R. [1869], 1 P. & D. 611); *Forbes v. Forbes* ([1854], 23 L. J., Ch. 341); *In re Macreight* ([1885], 30 Ch. D. 165); *In re Beaumont* ([1893], 3 Ch. 490).

² *In re Beaumont* (L. R. [1893], 3 Ch. 490).

³ *Sharpe v. Crispin* (L. R. [1869], 1 P. & D. 611, 617); *In re Beaumont* (L. R. [1893], 3 Ch. 490).

⁴ *Pottinger v. Wightman* ([1817], 3 Mer. 67).

husband.¹ A wife cannot acquire a separate domicile because she lives apart from her husband,² because they have separated by agreement (*Dolphin v. Robins*,³) or because of the husband's misconduct.⁴ It has not been yet decided that a judicial separation would give a wife the power to acquire a domicile for herself.⁵ In the latter case the facts were as follows: A., an Englishwoman, married B., a domiciled Englishman. After some years they separated, and then obtained a divorce from the Scotch Courts, which of course was not valid. A., after the decree, resided in France, and during B.'s lifetime married C., a domiciled Frenchman. B., her English husband, retained his English domicile till A.'s death in France. A., at her death, was domiciled in France. The other point decided in the case was that a foreign Court cannot dissolve an English marriage, when the parties are not *bonâ fide* domiciled in the foreign country. (Question, Even if they are ?) A Scotch Court pronounced a decree of divorce in the case of an English marriage, when there was no real Scotch domicile:—*Held*, that this decree had no effect, either as a divorce *a vinculo* or *a mensâ et thoro*. A divorced woman retains the domicile which she had at the time of divorce until she changes it by her own act.

Ascertainment of Domicil.—A person's domicile can always be ascertained by means of (1) a presumption of law, or (2) the known facts of the case. Mere presence in a country is presumptive evidence of domicile. The place of a person's birth or death obviously in no way affects his domicile. Once a person has been known to have had a domicile in a given country, he is presumed, in absence of proof of a change, to

¹ *Warrender v. Warrender* ([1835], 2 Cl. & F. 488); *Dolphin v. Robins* ([1859], 7 H. L. C. 390); *Yelverton v. Yelverton* ([1859], 1 Sw. & Tr. 574); *Re Daly's Settlement* ([1858], 25 Beav. 456; 27 L. J. (Ch.), 751).

² *Warrender v. Warrender* ([1835], 2 Cl. & F. 488).

³ [1859], 7 H. L. C. 390.

⁴ *Yelverton v. Yelverton* ([1859], 1 Sw. & Tr. 574); *Dolphin v. Robins* ([1859], 7 H. L. C. 390).

⁵ See Judgment of Lord Kingsdown, in *Dolphin v. Robins* (7 H. L. C. 420).

retain such domicil.¹ Any fact or circumstance may be evidence of domicil which is evidence either of a person's residence (*factum*) or of his intention to reside permanently (*animus manendi*) within a particular country. The following are facts which the Courts have admitted in evidence of domicil. Mere presence in a place,² time of residence,³ the absence of proof that a domicil once acquired has been changed,⁴ the taking of lodgings,⁵ the buying of a burial place,⁶ the exercise of political rights,⁷ the way of spelling a Christian name,⁸ oral or written expressions.⁹ Expressions of intention to reside permanently in a country—are evidence of such an intention, and as such, of domicil.¹⁰ Residence in a country is evidence of the intention to reside there permanently, *i. e.*, the *animus manendi*, and, is so far evidence of domicil.¹¹ By the law of England no length of time is necessary for the acquisition of a home or domicil. Residence in a country is not evidence of domicil when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently¹² (*animus manendi*). The criteria that are resorted to in order to determine towards which residence the intention is deemed

¹ See *Munro v. Munro* ([1840], 7 Cl. & F. 842, 891); *Aikman v. Aikman* ([1861], 3 Macq. 854, 877); *Douglas v. Douglas* (L. R. [1871], 12 Eq. 617).

² *Bruce v. Bruce* ([1790], 2 B. & P. 229); *Bempfle v. Johnstone* ([1796], 3 Vesey, 198).

³ *The Harmony* ([1800], 2 C. Rob. 322).

⁴ *Munro v. Munro* ([1840], 7 Cl. & F. 842, 891).

⁵ *Craigie v. Lewin* ([1843], 3 Curt. 435).

⁶ *In re Capdevielle* ([1864], 33 L. J. (Ex.), 306).

⁷ *Brunel v. Brunel* (L. R. [1871], 12 Eq. 298).

⁸ *Brunel v. Brunel* (L. R. [1871], 12 Eq. 298).

⁹ *Udny v. Udny* (L. R. [1869], 1 Sc. App. 441); *Bell v. Kennedy* (L. R. [1869], 1 Sc. App. 307); *Doucet v. Geoghegan* (L. R. [1878], 9 Ch. D. (C. A.) 441).

¹⁰ *Hamilton v. Dallas* (L. R. [1875], 1 Ch. 257); *Udny v. Udny* (L. R. [1869], 1 Sc. App. 441); *Bell v. Kennedy* (L. R., 1 Sc. App. 307).

¹¹ *Munro v. Munro* ([1840], 7 Cl. & F. 842); *The Harmony* ([1800], 2 C. Rob. 322).

¹² See *Jopp v. Wood* ([1865], 4 De G., J. & S. 616); *Urquhart v. Butterfield* (L. R. [1887], 37 Ch. D. 357).

to be important in cases of domicile, are various. The residence of a man's wife and family.¹ A man does not lose his English domicile of origin and acquire a Scottish domicile even by making his home in Scotland for thirty years.² The exercise of political or municipal functions in a certain place argues for that place as a person's domicile as against a place where such functions are not exercised.³ Residence in lodgings is not of much importance.⁴ Length of residence; naturalization in the new country;⁵ the place where children educated;⁶ marrying a daughter, apprenticing a son, and buying a partnership for him in the new country;⁷ removal of deceased's children to the new country,⁸ are criteria that are more or less important. In the recent case, *Re Martin Loustalan v. Loustalan*,⁹ Jeune and Lindley, M.R., Rigby and Vaughan Williams, L.J.J., held that a fugitive, the sentence against whom was subject to prescription, had not changed his domicile. An English domicile was not lost, notwithstanding employment abroad in the military service of the Crown.¹⁰

A necessary domicile is a domicile which is acquired independently of the will or election of the person concerned, e.g., prisoners, convicts, exiles, invalids residing abroad, ambassadors, consuls, persons in military, naval, or the Indian service, etc. It was held that A., who was a domi-

¹ *Platt v. Att.-Gen. of New South Wales* (L. R. [1878], 3 App. Cas. 336); *D'Etchegoyen v. D'Etchegoyen* (L. R. [1888], 13 P. D. 132); *Aitchison v. Dixon* (L. R. [1870], 10 Eq. 589).

² *Marchioness of Huntly v. Gaskell* (L. R. [1906], A. C. 56).

³ *Drevon v. Drevon* ([1864], 34 L. J., N. S., Ch. 137, per Kindersley); *Maxwell v. McClure* ([1860], 3 Macq. 859, per Campbell).

⁴ *Whicker v. Hume* ([1858], 7 H. L. 157, per Cranworth).

⁵ *Stanley v. Bernis* ([1830], 3 Hagg. Eccl. 370).

⁶ *Drevon v. Drevon* ([1864], 34 L. J., N. S., Ch. 139).

⁷ *Stevenson v. Masson* (L. R. [1873], 17 Eq. 78, per Bacon).

⁸ *Haldane v. Eckford* (L. R. [1869], 8 Eq. 642).

⁹ L. R. [1900], P. 211.

¹⁰ *Dalhousie v. McDouall* ([1840], 7 C. & F. 817); *Ex parte Cunningham, re Mitchell* ([1884], 13 Q. B. D. 418); *re Macreight, Paxton v. Macreight* (L. R. [1885], 30 Ch. D. 165); *Lauderdale Peerage Case* (L. R. [1885], 10 App. Cas. 692).

ciled Irishman, and who was imprisoned in England, still retained his Irish domicil.¹ And in *De Bonneval v. De Bonneval*² it was held that a French *émigré* still retained his domicil of origin, and that the fact of residence in his adopted country did not give him a domicil there. As regards invalids, who go abroad for the sake of their health, it was held that an invalid who went to France intending to reside there permanently or indefinitely, acquires a French domicil.³ The *ratio decidendi* in this case is residence plus *animus manendi*. An ambassador who is the accredited agent of his sovereign at a foreign Court generally retains his original domicil, but if the ambassador is, before his appointment, already domiciled in the country where he resides as such, then he retains his domicil notwithstanding his office, as when A., an Italian, acquired an English domicil. He was afterwards appointed the Italian representative at the English Court. Held, that A. retained his English domicil.⁴ Similarly, where an Indian prince came to England when he was ten years old, under a treaty then made for him by which his sovereignty was ceded to England, and resided in England for nearly forty years, it was held that he retained his original domicil—the inference of fact being drawn that the moment he had a will of his own he always intended to return to India and assume his old position if and as soon as he could.⁵ So with a consul.⁶

A soldier or sailor in the service of his own sovereign retains the domicil he had on entering the same, wherever he may be stationed.⁷ What is technically called an “Anglo-

¹ *Burton v. Fisher* ([1828], Milward's Reps. 183, 191, 192).

² [1838], 1 Curt. 856.

³ *Hoskins v. Matthew* ([1856], 25 L. J. (Ch.) 689).

⁴ *Heath v. Samson* ([1851], 14 Beav. 441).

⁵ *In re Duleep Singh* (7 Mor. Bk. Rep. 228).

⁶ *Udny v. Udny* (L. R. [1869], 1 Sc. App. 441); *Sharpe v. Crispin* (L. R. [1869], 1 P. & D. 611); *The Indian Chief* ([1801], 3 C. Rob. 12, 22); *Niboyet v. Niboyet* (L. R. [1878], 4 P. D. 1).

⁷ *Ex parte Cunningham* ([1884], 13 Q. B. D. 418, at p. 425, per Lindley, L.J.); *In re Macreight* (L. R. [1885], 30 Ch. D. 165).

Indian domicil" is a domicil acquired by a person in the military or covenanted service of the East India Company.¹ Such a person could not acquire a domicil in England.² But an English peer, notwithstanding the constitutional duty imposed upon him to attend the House of Lords, may abandon his English domicil of origin, and acquire a domicil abroad.³ There cannot be an Anglo-Chinese domicil.⁴

Domicil of Corporations.—The domicil of a trading corporation is its principal place of business; in the case of any other corporation, the place where its principal functions are discharged.⁵ As to domicil for testamentary purposes, it is provided, by 24 & 25 Vict., c. 121, that British subjects dying in a foreign country shall be deemed, for all purposes of testate or intestate succession as to movables, to retain the domicil they possessed at the time of going to reside in such foreign country, unless they have resided in such foreign country for a year at least, and shall have made a formal and public written declaration of an intention to become domiciled there. Similarly, foreigners dying in this country shall not be deemed to have acquired a domicil here unless they have resided here for the same period previous to their death, and have made a similar declaration of intention.

G. ADDISON SMITH.

¹ See Judgment of the Lord Chancellor (Cranworth) in *Moorhouse v. Lord* ([1863], 32 L. J. (Ch.), 295, 298).

² *Attorney-General v. Pottinger* (30 L. J. Ex. 284); *Craigie v. Lewin* (3 Curt. 435).

³ *Hamilton v. Dallas* (L. R. [1875], 1 Ch. D. 257).

⁴ *In re Tootal's Trusts* (L. R. [1883], 23 Ch. D. 532); *Abd-ul-Messih v. Farra* (L. R. [1888], 13 App. Cas. 431).

⁵ *Jones v. Scottish Accident Insurance Co.* ([1886], 17 Q. B. D. 421); *Watkins v. Scottish Imperial Insurance Co.* ([1889], 23 Q. B. D. 285); *Logan v. Bank of Scotland* ([1905], 22 T. L. R. 187).

IV.—THE REGISTRATION OF TITLE IN SCOTLAND.

IN Scotland the registration of title has attained great perfection. Generally speaking, all deeds affecting heritable property, such as lands and houses—as opposed to moveable or personal property—to be effectual, must be registered in what is called the Register of Sasines or Seisins. From a comparatively early period down to the year 1845 it was necessary that a person in whose favour a conveyance of heritable estate had been granted should take symbolical delivery of the subjects sold or conveyed. He himself, or frequently someone on his behalf—called his procurator or attorney—proceeded to the lands, accompanied by a Notary Public, two witnesses, and a party appointed by the grantor of the Conveyance, technically named a “bailie.” The procurator or attorney then produced the Conveyance, which contained what was called a precept of Sasine or mandate to seise the grantee under the Conveyance, delivered it to the bailie, and required him to give Sasine in terms of the precept. The bailie thereupon handed the Conveyance to the Notary, who read it and handed it back to the bailie. The bailie then gave what was called symbolical delivery of the subjects by delivering to the purchaser or his procurator the appropriate symbols. These were for lands and houses, “earth and stone;” for salmon fishings, “net and coble;” for teinds or tithes, a handful of “grass and corn;” for mills, “clap and happer;” for a right of patronage, “psalm book and church keys;” right of ferry, “oar and water;” jurisdictions, “books of court;” annual rent, of money, “a penny;” of grain, “a parcel of the grain”; and of houses held on burgage tenure, “hasp and staple.” After delivery the purchaser or his procurator “took instruments” in the hands of the Notary, who thereafter drew up a deed called an Instrument

of Sasine, narrating the foregoing proceedings, docquetted by himself and signed by himself and the witnesses. On the Instrument of Sasine being registered in the appropriate Register of Sasines, the right of the purchaser was completed, and he was said, in technical language, to be infeft or seised in the subjects.

In the year 1845 symbolical delivery became no longer necessary, the Notary executing an Instrument of Sasine on production of the Conveyance, the Instrument of Sasine being recorded as before. It might have been considered that after the abolition of symbolical delivery the recording of the Conveyance itself without an Instrument of Sasine should have been sufficient, but various objections were urged against this course—among others, that the register might be burdened with a great deal of irrelevant matter. In 1858, however, this reform was effected, and now it is competent to register any Conveyance containing a description of the subjects, and a clause empowering registration, in the Register of Sasines, on the warrant or mandate of the party in whose favour it has been granted or that of his law agent.

Prior to 1868 there were separate or Particular Registers of Sasines in the various Shires or groups of Shires as well as a General Register in Edinburgh, but after that date, the provincial registers were gradually transferred to Edinburgh, and now there is one General Register of Sasines with separate divisions for each County or where the Counties are small for combined Counties.

When a deed is to be recorded in the Register of Sasines it is taken to the Sasine Office, in the Register House—a large building at the east end of Princes Street, in Edinburgh—or, in the case of a Country deed, it is sent to the Register House Officials by post. The party who presents the deed for registration enters a short description of it and the name of the grantee in a book called the Present-

ment Book, inserting likewise the date and hour of recording and signing the entry. An abstract of the deed is then made and inserted in a book called the Minute Book. The deed is likewise recorded entire in the books applicable to the County where the subjects are situated. If the subjects are situated in more Counties than one, the deed is not recorded entire in each division, but in one only, a memorandum being inserted in the other divisions. After the deed has been recorded it is given out to the party who lodged it, unless the Warrant of Registration bore that it was to be registered for preservation as well as for publication, in which case only an extract or office copy is given out, the principal deed being retained.

It may be remarked in passing that priority of registration is of the greatest importance. Thus if two bonds over the same subjects are presented for registration together—the one dated, say, 23rd June and the other 24th June, but the latter is entered first in the Presentment Book, it will obtain a preference over the former, notwithstanding that the former is prior in point of date—and in the event of the subjects being sold under the powers in the bonds (which, for the sake of illustration, we shall say are for the same sum) and being sufficient to meet the sum in one bond only—the bondholder who has got his bond first on the register, notwithstanding that it is posterior in point of date will obtain the whole sum under the bond while the other bondholder will get nothing. There is a statutory exception to this, however, where the deeds are sent to the Keeper of the General Register of Sasines by post, and it is provided that “where two or more Writs so transmitted shall be received by the Keeper at the same time they shall be deemed to be presented and registered contemporaneously.” It frequently happens, too, that bonds themselves contain clauses expressly declaring how they shall rank—whether prior or posterior to, or *pari passu* with, other bonds, and such

clauses determine the ranking as between such bonds irrespective of the dates of recording.

Now, when a house we shall say is to be sold, it is essential to the purchaser that he should have a clear title, *a. v.*, that the subject of his purchase is not burdened with bonds or other incumbrances. Along with most titles there is therefore delivered to the purchaser a document called a Search for Incumbrances. This document contains a description of the subjects—as appearing in the titles—the various transmissions they have undergone, and the bonds, &c., affecting them. As a rule, at the time of the purchase the search is not brought down to date because various transactions may depend upon the sale, and the deeds disburdening the subjects, as well as the purchaser's title, may not be recorded till the term day or the day when the Disposition or Conveyance is delivered to the purchaser. The Solicitor for the seller accordingly gives to the purchaser or his Solicitor an obligation to deliver or exhibit, as the case may be, within a specified time—generally two months—a valid search showing the subjects to be clear of incumbrances. Such is the practice in Edinburgh and other large towns; but in small Country towns searches are not so common—the purchaser's Solicitor frequently relying on the good faith of the seller's Solicitor, who knows personally what incumbrances affect the subjects. This practice in the Country is rapidly undergoing a change, and searches are becoming more general in view of a decision of the Court of Session some years ago as to liability of Agents in dispensing with searches. A purchaser had bought a property at his own hand without consulting a Solicitor, it being part of the bargain that no searches were to be given by the seller, and he thereafter employed a Solicitor to prepare the Conveyance. The Court held that it was part of the Solicitor's duty to point out to his client the risk which he ran in dispensing with searches, and as it had transpired that there were

incumbrances affecting the subjects, held him liable in damages to his client. This decision, therefore, may have the effect of making Solicitors in Country districts more particular in the matter of searches.

When a search is required, a description of the subjects—with a note of the period to be searched—is sent to the Keeper of the Register of Sasines. In that case the search is made by the Register House officials, and is known in the legal profession as an “Official Search.” But the vocation of Searching is not confined to these alone. The records are open to the public on payment of a fee for the use of the books. Accordingly there are several Professional Searchers whose business is confined solely to Searching, and some of them employ considerable staffs of clerks in their work. Searches made by such searchers are termed “Unofficial Searches” or “Professional Searches.” Some agents prefer an Official Search, while others order an unofficial one. It is understood that the latter can be had more expeditiously, and sometimes this is a matter of great moment. Indeed, when an important transaction is pending, and the state of the Record is one of the considerations, the Professional Searcher will sometimes receive a note for search with instructions to wire immediately to his constituent how the Record stands.

It will thus be seen that the work of a Searcher requires great care and experience as well as a knowledge of Conveyancing, because the least slip might have disastrous consequences. The unofficial Searchers work in a large room, called the Record Room in the Old Register House, Edinburgh. The walls of this room and an adjoining passage are lined with large folio volumes, some of which are in manuscript while others are printed. These consist of the abridgments of the various deeds recorded in each Register and the Indexes of places and of parties' names. The *modus operandi* is somewhat as follows:—

Having mastered the description of the subjects, or keeping it beside him for reference, and obtained the name of the party to whom the subjects belonged at the date of the commencement of the search, the Searcher examines the Indexes of Persons and Places, and then turns up the references in the abridgment. He is thus able to trace each Conveyance, Bond, or other encumbrance affecting the subjects, and when he comes to a Conveyance by the party against whom he is searching to another party, he then commences a search against the latter until he in his turn parts with the property, and so on till the search is brought down to date. In practice, it is common for the Searcher to have a clerk or clerks to assist him. The clerk with the Index in front of him calls out the numbers opposite the name of the party being searched against. These are the numbers of the abridgments. The Searcher is thus enabled to confine his attention to the abridgments unhampered by constant reference to the Indexes. Of course, especially where the name of the party is a common one, the Searcher frequently gets upon a false scent—as the reference may be to another party of the same name—or again the party may be the same but the subjects may be different.

Some years ago there was instituted in the Register House what is known as the Search Sheet. It is an attempted adaptation of the ledger principle and proceeds somewhat on the following lines. Where a grant of land, we shall say—technically called a feu—is given off from some large estate, a description is made of it and indexed; and where a part of the feu is thereafter sold or mortgaged, the part so sold or mortgaged is in like manner noted and indexed. Though such a system seems well adapted to a young Country, for example, a colony such as Australia, there have been grave misgivings as to its adaptability to an old Country like Scotland, where the tenure of land is

somewhat complicated. It is understood that the official searches are now made to a great extent from the Search Sheet, so far as it goes, though the Indexes, and Abridgments are perhaps utilized to check it. The system of the Search Sheet is attended with some disadvantages, but its continuance was recommended by a Departmental Committee of Enquiry, presided over by Lord Low, one of the Senators of the College of Justice in Scotland. The unofficial or Professional Searchers rely on the perhaps more trustworthy system of searching by the Indexes and Abridgments which have been in existence from 1781. Where subjects are held by burgage tenure, writs affecting them are registered in the Registers of Sasines for the respective Burghs, and searches against such subjects are made by the Town Clerks—or by the unofficial Searchers.

In addition to the property or Sasine Registers, there are what are called the Personal Registers, now combined in the Register of Inhibitions and Adjudications. Notices of Sequestrations and Inhibitions with the view of preventing parties alienating their heritable estates, are registered in this Register, and thus it is necessary, in order to have a complete search, that this Register should likewise be examined.

Among other Registers to which reference may be made, is that of the Books of Council and Session, in which such deeds as Wills and Marriage Contracts are registered for preservation. The principal deeds in these cases are kept in the Register House and not given out after being lodged, registered extracts of the deed merely being delivered. These Extracts have by statute the legal effect of the original, except in cases of proving the signatures.

From the above sketch of the registration system of Scotland and the means of utilising it, our opening statement does not appear to be exaggerated, and in support of it, we cannot do better than close in the quaint words

of a distinguished Scottish lawyer of a former age :—
“ Some inventions,” says Sir George Mackenzie, “ flourish
“ more in one Country than another, nature allowing no
“ universal excellency and God designing to gratify every
“ Country He hath created : so Scotland hath above all
“ other nations by a serious and long experience obviated
“ all fraud by their public registers.”

H. W. GIBSON.

V.—CRIMINAL STATISTICS, 1905.¹

THE Criminal Statistics for the years 1903 and 1904 were published with only brief Introductions giving summaries of the principal figures for those years, but with the Statistics for 1905 we are fortunate in having, once more, an exhaustive Introduction from the pen of Sir John Macdonell, Master of the Supreme Court and Editor of Part II of the Judicial Statistics, dealing not only with figures for the year 1905, but also with the question of the increase or decrease of crime in recent years, and with a number of other questions of special interest and importance arising out of the figures. Of course, an Introduction of this kind, written by one who has a wide knowledge of the subject-matter and mature experience in the handling of statistics, vastly enhances the interest and value to the lay reader of a large and complex mass of figures like the Criminal Statistics. When it is seen what unexpected results may be obtained from statistics, the prudent person will be disposed to handle them as a weapon in controversy with as much caution as he would use in sterner warfare towards an unexploded bomb. With an Introduction like the present we are, however, in a safer position

¹ *Judicial Statistics (England and Wales), 1905.* Part I.—*Criminal Statistics.* London : Wyman and Sons.

than this, and under the guidance of Sir John Macdonell even the lay reader may approach the Criminal Statistics with confidence, and find them full of interest and instruction.

It will be necessary, by reason of the exigencies of space, to pass over many of the interesting questions raised in the Introduction, but we propose first to discuss the figures for 1905 as compared with past years, with special reference to the question, which is perhaps the most interesting and important of all, whether the year shows an increase or decrease in crime, and then briefly to indicate the scope of Sir John Macdonell's inquiries into some of the other questions.

The principal conclusion reached in our examination in this Magazine¹ of the Criminal Statistics for 1903 and 1904 was that these years fell in a period of increasing crime, which dated from 1899 and followed a period of years in which crime (judged, that is, by the number of the more serious offences) had on the whole steadily decreased. We ventured to connect this increase with the industrial and commercial depression and social distress which marked the years following 1899, and we expressed the hope that the improvement in these conditions which had set in before 1906 might be attended with an improvement in the statistics of crime. A matter of hope it must remain for the present, for the statistics for 1905 show little or nothing by way of realisation. Perhaps this is not to be wondered at, for though in the latter part of the year there was some improvement in commercial prosperity as compared with the preceding years, or, at least, the depression showed a disposition to moderate, the year was, on the whole, one of very much distress.

The year 1905, then, belonged to the period of increasing crime which commenced in 1899 or thereabouts. The

¹ Vol. XXXI, p. 411.

total number of persons tried or committed for trial for indictable offences in 1905 was 61,463, as compared with 59,960 and 58,444 in 1904 and 1903 respectively, and with 50,494 in 1899, thus showing an increase in the six years of nearly 22 per cent. Measured in proportion to population the increase was still considerable, for the proportion of the number of persons tried to the total population in 1905 was 180 per 100,000 of population as against 178 in 1904 and 159 in 1899. Throughout the five years preceding 1899 the figure was fairly constant and averaged about 51,000.

Moreover, the returns giving the number of crimes reported to the police corroborate the testimony of these figures which we have just quoted, for they show that the total number of indictable crimes reported in 1905 was 94,654, as compared with 92,907 in 1904 and 76,025 in 1899, an increase of over 24 per cent. in the six years. In proportion to population the figures were 277 per 100,000 of population in 1905, as compared with 271 in 1904 and 239 in 1899 and a decreasing proportion in the five preceding years.

Of course the figures cannot be taken as they stand as furnishing an *accurate measure* of the increase of crime—such a measure, for instance, as a physicist would feel he had in his figures for the extension of a metal bar under heat, when he had made his observations with the finest instrumental power and every experimental precaution. It is necessary to make allowance for changes in the law, in public opinion, or in the readiness on the part of the police and other local authorities to prosecute, for any such changes, quite apart from any changes in criminality, may affect the number of persons tried, and even the number of crimes reported to the police. But so far as indictable crime is concerned, there is no evidence to show that the apparent increase of crime since 1899 can be explained away to any material extent by such considerations, and we are bound

to conclude that the figures prove a material increase, and that they roughly represent its magnitude.

It is, however, important to point out that the increase in the last few years appears comparatively insignificant if it be set against the very great decrease indicated by comparison of the figures with those of say 40 years back. We find, for instance, from a striking table given in the Introduction, that 40 years ago the proportion of persons tried for indictable offences per 100,000 of population was nearly 290, and that the proportion of crimes reported to the police was over 440, as against the corresponding proportions, 180 and 277, for 1905. The further we go back into the past the more difficult it becomes safely to draw conclusions from criminal statistics; but it seems safe to say that, notwithstanding any allowances which have to be made for changes in the law and in police activity in prosecuting, we shall not err on the side of over-estimating the decrease in crime if we take it as proportional to the decrease in these figures.

Whatever may be the influences operating to produce an increase or decrease in the volume of the country's crime, it is not to be expected that the effect will be the same in regard to every kind of crime—crimes of passion, "professional" crimes and the rest,—and we shall therefore examine briefly the figures for the various classes into which indictable crimes are divided in the Statistics.

In Class I—Offences against the Person—there was a slight decrease in the number of persons proceeded against, namely, from 2,525 (itself an exceptionally low figure) to 2,503, which is the smallest figure since 1892; but seeing that the number of crimes reported to the police increased from 3,384 to 3,512 it is not possible to conclude that there was any real decrease in this class of crime. Probably there was no change of any significance, and the smallness of the change in the number of prosecutions

goes to confirm what was said in the article in this Magazine on the Criminal Statistics for 1904, as to the remarkable general steadiness from year to year of the aggregate volume of indictable crime against the person.

Sir John Macdonell finds, however, taking a longer survey into the past, that the figures as compared with twenty years ago have suffered a marked diminution, and that there is every reason to believe that this change is indicative of a real and gratifying diminution in the volume of this class of crime. The average proportion to population of the number of persons tried in the four years 1885—1888 was 10 per 100,000 of population, while from this time the number steadily diminished, so that in the years 1902—1905 only 7·4 persons per 100,000 of population were tried.

It will thus be seen that offences against the person have not contributed to the increase in crime since 1899: and it is hardly to be expected that they would, in so far as the increase was due to economic conditions. But when we come to Classes II and III,—Offences against Property with and without Violence, respectively,—the case is very different. It is a reasonable hypothesis to suppose that commercial depression, overstocked labour markets and the concomitant social distress would tend to cause many idle and undisciplined persons, especially youths, to fall into casual housebreaking or thieving ways, or, still worse, to embark on housebreaking or theft as a profession, and in the present instance some justification for such a hypothesis is found in the fact that the principal part of the increase in crime since 1899 has taken place in just these classes of offences. Sir John Macdonell gives in his Introduction a very interesting diagram which may be mentioned as further confirming this view. This diagram shows graphically the fluctuations in the numbers, proportionately to population, of (1) bankruptcy proceedings

commenced, (2) receiving orders made, and (3) persons proceeded against for larceny, in the twenty years, 1885 to 1905; and it is very striking to observe how consistently the curve representing the third of these numbers not only moves in the same direction at the same time as the other two, but maintains for the most part a sensible correspondence between the intensity of the respective maxima and minima.

The increase in these classes of crime since 1899 has proceeded steadily, and in the aggregate presents quite a formidable appearance. In Class II—Burglary, House-breaking, Robbery with Violence, etc.—the number of persons tried rose from 2,042 to 3,460 in the six years 1899 to 1905, or, in proportion to population, from 6·3 to 10·1 per 100,000; and in Class III—Larcenies (mainly “simple and minor Larcenies”), Frauds, etc.—the number of persons tried rose from 44,463 to 53,844, being 138·9 and 157·6 per 100,000 of population in the two years respectively. As regards the allowance to be made in Class II for the effect of the Summary Jurisdiction Act 1899, which allowed burglary and housebreaking committed by young persons between 12 and 16 years of age to be tried summarily, we may point out that only 495 persons were tried summarily for these offences in 1905, so that not much “correction” has to be introduced on that account. The great bulk of the numerical increase in Class III was in “simple and minor larcenies” tried summarily, and therefore probably of lesser importance, but there was, at the same time, a marked increase in the number of larcenies tried on indictment. In 1905, for the first time since the Summary Jurisdiction Act 1899 made false pretences an offence triable summarily, the number of persons tried for this offence did not markedly increase, being practically the same as in 1904, namely, 2,150 as against 2,153, and there was a similar check in the number of these crimes

reported to the police. It is not, however, to be supposed from this that there was necessarily any real decrease in the prevalence of obtaining property by false pretences: everyone probably has actual experience of transactions which might be, but in fact are not, punished as such crimes, and there can be no doubt that the prevalence of the crime is not at all adequately represented by the figures relating to criminal proceedings.

The figures for the offences comprised in Class IV—Malicious Injuries to Property—and particularly those for the offence Arson, were exceptionally high in 1904, higher indeed than in any other year since 1863. In 1905 there was a slight decrease as regards arson, but for the rest,—offences such as maiming cattle, destroying railways, and other miscellaneous injuries to property—the high level of 1904 was practically maintained: 194 persons were tried for arson and setting fire to crops, as against 219 in 1904 and an annual average for 1896 to 1903 of 141; and for other malicious injuries to property 201 persons were tried, as against 214 in 1904 and an average of 173 in the eight preceding years.

There was no marked change in the total number of persons tried for offences in Class V—Forgery and Offences against the Currency—but the increase in the latter offences apparent for several years was continued in 1905. The number of persons tried for making and uttering counterfeit coin remained steadily in the neighbourhood of 100 per year throughout the period 1895 to 1899; it fell to 70, 60 and 59 in the next three years, but from 1903 to 1905 it rose again, being 89, 98 and 156 in these years respectively, and the course of the figures for the number of crimes reported to the police was precisely parallel.

There was no change of note in the Miscellaneous Offences in Class VI, save as regards attempts to commit suicide. This offence appears to have increased markedly

from 1899 or 1900, the numbers both of persons proceeded against and crimes reported to the police having risen, though the former much more than the latter. The number of persons tried maintained a steady average of about 190 between 1895 and 1900, but rose rapidly from the latter year to 284 in 1905, an advance of 50 per cent.; and the number of crimes reported rose from about 1,950 to 2,432, an advance of 25 per cent. The growth of these figures may be attributable in part to an increased tendency to call in the police, and, on the part of the police, to prosecute; but it seems impossible to deny that after due allowance has been made for this we are left with strong indication of a real increase in the offence since 1900. We may mention also that in 1905 the number of verdicts of suicide returned by coroners' juries increased once more, after having suffered a slight check in 1904. (Table XXX.)

It will thus be seen that, though the recent increase in crime has been very generally distributed among the different classes of offences, the numerical bulk of the increase has been in the class of offences against property, particularly offences against property without violence, and in dealing with any statistics purporting to refer to indictable crime generally it is important to remember, that there is always, in this country at any rate, an enormous numerical preponderance of crime against property. Taking, for example, the years 1893 to 1905, the proportion of crimes against property without violence to the whole of indictable crime (as measured by the number of persons tried) was nearly 90 per cent., varying between 89·3 and 87·3 per cent., decreasing on the whole from 1893 till 1903 and then increasing slightly. In the same period the per-centage of crimes against property with violence varied between 3·8 and 5·6 per cent., rising steadily from the former to the latter figure, so that we have the result that throughout the thirteen years 1893 to 1905 the proportion of persons

tried for offences against property to the total number tried for indictable offences lay between 93·2 per cent. (1894 and 1905) and 92·1 per cent. (1895).

Turning now to consider non-indictable offences, we find that the total number of persons tried was 729,727 (2,137 per 100,000 of population) as against 747,179 in 1904, which, with the single exception of the figure 761,322 for 1899, was the highest on record. But 1899, we notice, was the very year when, as mentioned above, indictable crime was exceptionally little, probably less than ever before; and this brings us to the important point that these non-indictable offences are in general essentially different from the indictable offences which we have hitherto been considering, and, accordingly, their prevalence is affected by quite different conditions. The totals are swayed one way or the other mainly by the figures for drunkenness and "crimes" which are criminal in nothing more than a technical sense. The number of offences created by legislation or municipal by-laws has largely increased in the last few decades, and it is probably fair to attribute the growth in the number of prosecutions to this multiplication of regulations rather than to any real increase in lawlessness.

It is possible, however, conveniently to separate from the rest certain non-indictable offences, and to class them together as being more definitely criminal in character—assaults, cruelty to children, malicious damage, unlawful possession or pledging of property, stealing animals, fences, fruit, &c., offences under the Prevention of Crimes Act, may be mentioned among them—and we find that these offences appear to have diminished continuously and very greatly in the course of the last thirty years. In 1905 the proportion to population of persons tried for these offences was 249·3 per 100,000, which is less than half the average proportion in the quinquennium 1876 to 1880, and the decrease has been steadily maintained throughout the thirty years, even since 1899, while indictable crime has been increasing.

As regards the other non-indictable offences, one of the most striking features of the figures in recent years is the decrease in the number of persons tried for assaults. This decrease has been both rapid and continuous for many years, and has touched all classes—assaults on constables and aggravated and common assaults. The total number of persons tried for assaults in 1905 was 52,811 (the smallest total on record), as against 54,971 in 1904 and 71,240 in 1899, a decrease of 26 per cent. in the six years. The averages for the six quinquennial periods from 1875—1879 to 1900—1904 were 93,684, 84,770, 77,498, 77,108, 71,972, and 60,933 respectively.

It is a much-discussed question whether drunkenness and crime go together. In a certain sense there can be no doubt that there is a close connection, in that the history of individual cases often discloses a strong presumption that drinking (not necessarily habitual drinking) was a contributing cause to the offence, and there is, besides, a tendency for the ranks of youthful offenders to be recruited largely from those who have been prejudiced by birth and upbringing in drunken families; but in view of the considerations that excessive drinking does not necessarily correspond closely with the drunkenness in public places which mainly comes under notice in the criminal statistics, and that the general social effects of increased drinking will appear but slowly, any theory of close correspondence between statistics of crime and drunkenness must be regarded with caution. Indeed it is often found that years of prosperity when, generally speaking, crime tends to be less, are the years when there is most drinking, and those who have seen much of the life and habits of the casual labouring classes will readily appreciate some of the grounds for this.

The effect on the prevalence of crime and drunkenness of periods of growing or declining prosperity—at any rate,

the shorter periods which we are now mainly concerned with—would thus appear often to be of an opposite nature, and in the figures now before us it is possible, perhaps, to trace this feature. It would be easier if it were not for changes in the law, particularly the passing of the Licensing Act 1902, which have much affected the number of prosecutions under the Intoxicating Liquor Laws; but we find that prosecutions for drunkenness increased in the years 1896 to 1899 (when wages were high, employment brisk and indictable crime uniformly less prevalent) from 608 to 672 per 100,000 of population, and then diminished, when social distress and indictable crime began to increase. Then the Licensing Act 1902 came into force, and consequently there was in 1903 a very large increase in the number of prosecutions—namely, to 690 per 100,000 of population; but after 1903 the number at once decreased again to 674 and 642 in 1904 and 1905 respectively. It is probable that this general tendency of the number of prosecutions for drunkenness to decrease since 1899 is concomitant with a real decrease in drinking through the country as a whole, but whether this is a result merely of the general industrial and commercial depression, or whether it is the result of the growth of more temperate habits, it would be difficult to say. If the future is not much “obstructed” (that is, from the point of view of statistical inquiry) by impending changes in the Intoxicating Liquor Laws, it will be interesting to compare the movements of prosecutions for drunkenness and crime under the influence of the improved commercial and industrial conditions which now prevail.

The notable increase in the number of prosecutions for the vagrancy offences, Begging and Sleeping Out, since 1899 or 1900, was still continued in 1905. The course of these figures is truly extraordinary, and compels some further notice though the subject has been specially alluded to in connection with the criminal statistics for 1903 and 1904.

Between 1893 and 1900 the number of persons prosecuted fluctuated irregularly, averaging about 23,900, and reaching the low figure of 18,791 in 1900; but from that year the increase has been uninterrupted, and so rapid that the figures for 1904 and 1905 were 34,821 and 39,022 respectively, an increase of nearly 108 per cent. in five years. It may be mentioned further that there was in the same period, 1900 to 1905, a distinct increase in the proportion of cases in which prosecution was followed by conviction, this proportion being 64 or 65 per cent. in the years 1893 to 1899, but 69 to 71 per cent. in 1902 to 1905. Thus the number of convictions increased even more rapidly than the number of prosecutions, namely, by no less than 117 per cent. in the five years 1900 to 1905.

It is well known that, generally speaking, more vagrants are relieved by Poor Law Authorities in the winter than in the summer, no doubt for the double reason that many confirmed vagrants prefer open air to indoor lodging in the summer but are glad in the winter to have recourse to the provision made under the Poor Laws, and that a number of persons who are able to get employment in the summer obtain relief as vagrants in the winter. Two diagrams are given in the Introduction comparing the number of vagrants reported as being relieved in each county on the 1st January and the 1st July 1905, and these, while showing that the total number of vagrants receiving relief was considerably greater in January than in July, bring out the curious result that the summer decrease was almost wholly confined to the southern counties.* If an imaginary line be drawn across England from the Wash to the Bristol Channel, the counties lying to the south of that line show a marked summer decrease, on the average 26·3 per cent., while in the counties to the north there was often no decrease at all, and the average was only ·3 per cent.

The total number of persons proceeded against for offences

under the Highway Acts was practically the same in 1905 as in 1904, namely, 47,871 as compared with 48,109. There were, however, marked changes under certain of the sub-headings; thus the number of Offences by Owners and Drivers of Carts decreased from 11,309 to 10,434 (continuing a decrease which had been in progress for several years), Obstructions and Nuisances showed a similar decrease, namely, from 22,789 to 20,742, while offences under the sub-head "Motor Cars" increased from 3,879 to 6,777, a matter of 75 per cent.

In 1905 there was a marked and sudden increase in the number of prosecutions for offences connected with Betting and Gaming. The number of persons proceeded against in each of the years 1902 to 1904 lay between 1,400 and 1,600, but sprang up in 1905 to 2,123. This increase is no doubt attributable in part to the increasing prevalence of the vice of gambling, but much more to the operation of a stimulated public opinion and increased activity on the part of the police in prosecuting offenders.

From Table XXXI we find that in 1905 there was some decrease in the total number of persons received in prison (including persons sentenced to penal servitude)—namely, from 197,941, or 586 per 100,000 of population, in 1904 (these being the highest figures for many years) to 195,056, or 571 per 100,000 of population, in 1905. Needless to say, these figures largely depend on the average length of sentences, as well as on the number of persons convicted.

Table XXXV shows the offences for which the prisoners were sentenced. No less than 84 per cent. (164,796) had been convicted of non-indictable offences, and in 69,195, or not far from half of these cases, the offence was drunkenness. For the rest, 21,859 of the prisoners had been sentenced for simple larceny, nearly 18,000 for begging, and about 12,000 for other offences against the Vagrancy Acts, offences against Police Regulations, and for assaults.

Table LIII deals with the exercise of the Prerogative of Mercy. Three Free Pardons were granted in 1905, and 19 Conditional Pardons (the highest number granted for many years), 15 being commutations of sentence of death to penal servitude for life. There were 211 remissions of penal servitude, imprisonment, or fine, 96 of which were granted on medical grounds (in many cases to women approaching their confinement, who, if longer detained, would not have been fit for discharge at the expiration of their sentence), 24 on the ground that fresh evidence had established reasonable doubt as to the prisoner's guilt or altered the view as to the legal character of his offence, and 55 in simple mitigation of the sentence—that is, generally speaking, under extenuating circumstances such as youth, provocation, or mental disturbance.

At the close of that part of the Introduction dealing more particularly with the figures for 1905 Sir John Macdonell discusses several interesting and important questions of a more general nature. We cannot here do more than briefly mention the scope and some of the conclusions of these inquiries.

The first question is the Detention of Prisoners before Trial. This was discussed also in the Introductions to the Criminal Statistics for 1895 and 1898. In the former of these Introductions it was shown that between 1854 and 1895 there had been a *decrease* in the proportion of persons who were granted bail. After 1895 there was some improvement in both the number of persons released on bail and the length of the period for which the rest were detained pending trial, but since 1901 the number released on bail has again shown a tendency to decrease. Tables are given showing the number and length of the longer periods for which persons were detained in prison pending trial for the different offences, and the results of the proceedings (acquittal, conviction and sentence) against these persons.

Next there is an article entitled "Homicides, their Circumstances and Causes." Sir John Macdonell points out that murder, in this country at any rate, commonly means murder of women by men: seven out of eight of the culprits are men, and three out of five of the victims are women. The proportions are different in cases where a verdict of manslaughter (not murder) is returned, two out of three of the victims in such cases being males. Tables and figures are given showing for the last 20 years particulars, so far as they are ascertainable, of the sex, age and occupation of the murderers, the distribution of murders among the days of the week and among the hours of day and night, the motive for the crime, the weapon used, and so forth. We may mention that the culprits belong most commonly to the labouring classes, and half the women are described as domestic servants; that Saturday is the day of the week when murders are commonest, and Sunday when they are fewest; and that one-fifth of the crimes are recorded as happening between 10 p.m. and midnight, and nearly one-half in the six hours between 8 p.m. and 2 a.m. Sir John Macdonell concludes that, so far as he can tell, murder "is not generally the crime of the so-called criminal classes, but is in most cases rather an incident in miserable lives in which disputes, quarrels, angry words and blows are common," and there is no doubt that drinking, which Sir John Macdonell mentions afterwards, is very often indeed a material contributing factor to the crime.

Then the subject of Female Criminals is dealt with, and we are given figures showing the general proportion of females to males among all convicted persons, and among persons convicted of certain particular offences. The general proportion of convicted females to males is about 1 to 3; but there was some variation in the last decade, namely, a slight increase in the years 1897 to 1900, and a larger decrease afterwards. These changes are probably

attributable to the South African war, by reason of which many men were withdrawn from the country and the proportion of females to the total population somewhat increased from the normal, and at the same time employment was extended to many men who remained and who generally might be counted among the casual criminal class.

Interesting figures are given on the subject of Juvenile Crime. It is found that relatively to population the numbers of persons of all ages under 21 convicted of indictable offences have considerably decreased in the last decade, and that the decrease in the number of young persons received in prison has been still greater. These changes cannot be taken, however, as necessarily representing a change in the prevalence of juvenile crime; probably they are more the result of change in the methods adopted by the Courts of dealing with juvenile offenders who are charged before them.

Tables and diagrams are next given showing the recent tendencies as to the Length of Sentences. Sir John Macdonell finds a decrease in the number and length of the sentences of penal servitude, and at the same time indications of a reaction against the movement in favour of short (and often futile) sentences of imprisonment. There has been at the same time a marked increase in the number of persons released on recognizances without sentence.

Under the heading "Previous Convictions of Criminals" we are shown the large proportion of persons convicted at Assizes and Quarter Sessions who had been previously convicted. This proportion was 61 per cent. in 1905. The proportion of previously convicted burglars and house-breakers is even greater (76 per cent. in 1905), and no less than 206 of such criminals convicted in 1905 had more than ten previous convictions, and 81 had more than twenty. The improvement in the means of identifying criminals, attained by adoption of the finger-print system, appears to have had a material effect in increasing the proportion

of convicted persons who are known to have been repeatedly convicted.

We have next a Table bearing on the Proportion of Convictions to Acquittals, a subject which was dealt with also in the Introduction to the Criminal Statistics for 1894. This Table gives the proportion of convictions in each of the years 1901 to 1905 for each of the main heads under which Indictable Offences are grouped, and it shows that the proportion of convictions is particularly high in the case of crimes against property (90 per cent. for Class II,—Offences against Property with Violence), and lowest of all in Class I,—Offences against the Person,—namely, about 75 per cent., subject to a steady increase from 72·7 to 76·5 in the years 1901 to 1905.

Lastly, Sir John Macdonell gives some “Notes on Crime in Large Towns,” continuing the Notes on the same subject which appeared in the Introduction to the Criminal Statistics for 1899, and dealing with the movements of crime in London, Liverpool, Birmingham, Leeds and Cardiff, with special reference to the prevalence of particular classes of crime in the different places.

VI.—APPEAL ON MATTER OF FACT IN CRIMINAL CASES.¹

IT would be easy to multiply instances where juridical opinion in this country has been sharply divided as to the merits of a proposed reform of the Criminal law. Lord Thurlow and five law lords declared in their protest against Fox’s Libel Act in 1792, that it foreshadowed the confusion and destruction of the laws of England.² Lord

¹ A reply to a pamphlet by Sir Harry Poland, K.C., and Mr. Herman Cohen, on the Criminal Appeal Bill 1906.

² Lord Campbell’s *Lives of the Chancellors*, Vol. 7, p. 269; *Parl. Hist.*, xix; 1404, 1534-8; *Ann. Reg.* 1792, 353.

Ellenborough opposed Romilly's measures abolishing capital punishment for petty thefts, on the ground that the poorer classes relied on capital punishment in such cases to secure the scanty comforts they enjoyed.¹ Chief Baron Pollock declared before a Parliamentary Commission that allowing a prisoner to give evidence would be "a very mischievous measure;"² and the debates in the spring of 1858 afford an instance where an Attorney-General, Sir R. Bethell, differed from all the law lords as to the necessity of a reform of the substantive Criminal law. Again, the task of meeting the arguments of Sir Harry Poland and Mr. Herman Cohen is rendered the more feasible, because it is far from clear that they object to the entire measure in principle. It is, for instance, quite inconsistent that they should do so, and yet urge that the measure of 1906 should have been extended to Ireland.³ On the other hand, the argument of the learned authors that this circumstance itself involves anomaly, because the Criminal law of Ireland generally is the same as that of England, seems gravely impaired by the circumstance that by far the most important criminal statute for the last decade—the Evidence in Criminal Cases Act 1898—does not extend to Ireland.⁴ It cannot, of course, be contended that it is desirable that there should be inequalities between the Criminal law of England and Ireland; all the teachings of history indicate the contrary conclusion. The arbitrary differences that formerly existed between the English law of procedure and evidence at a trial for high treason and that of Ireland, are at this day consecrated in the protests of a Curran and a Whiteside. It is the more consistent for any who approves of the principle of criminal appeal to object to the measure being arbitrarily confined to England, because the allowing a prisoner to give evidence on his own behalf has a very distinct bearing on appeals

¹ *Life of Romilly*, Vol. 2, p. 327.

² *Parl. Pap.*, 1836; *Cd.* 343, p. 77.

³ *Ibid.*, p. 43.

⁴ *Evidence in Criminal Cases*, s. 7, ss. (1).

on fact.¹ The permitting a prisoner to give evidence is a measure of justice that is *sui generis* with allowing an appeal upon matter of fact; though it is submitted that there is a great difference between the value of the two privileges to a prisoner. But as a prisoner on his trial for an indictable offence cannot give evidence on his own behalf in Ireland, it appears to involve nothing less than retributive injustice to withhold from him a right of appeal upon matter of fact.

The objections taken by Sir H. Poland and Mr. Herman Cohen to criminal appeal are altogether less irreconcilable and sweeping than the objections taken to criminal appeal sixty years ago by Lord Denman (then Lord Chief Justice of England), Lord Lyndhurst, and Lord Brougham.² Lord Lyndhurst and Lord Brougham adopted in terms the objection advanced by Lord Denman, that if a second trial was to be granted in cases of felony there would be a danger that witnesses would be kidnapped in the interval between the first and second trials by the friends of the prisoner. In view of the fact that it has always been considered that it is one of the greatest defects in the Criminal law that false imprisonment and kidnapping should be mere Common law misdemeanours, so that either offence is merely punishable by fine or imprisonment without hard labour,³ it seems curious that the objection should not have been taken by Sir Harry Poland and Mr. Herman Cohen. It is of course essential to admit that since 1847, there have been various provisions that strengthen the law as regards false imprisonment,⁴ but this is only as regards women and

¹ Cf. Speech of Lord Alverstone, L.C.J., on the Criminal Appeal Bill in the House of Lords, reproduced in the *Law Times*, June 23rd, 1906.

² Minutes of Evidence of the Judges before the Select Committee of the House of Lords to whom was referred the Bill, intituled "A Bill to amend the Administration of the Criminal Law." *Parl. Papers*, Session 1847-8; *Cd.* 523.

³ *R. v. Hamilton* (L. R. [1901], K. B. 740.)

⁴ 24 & 25 Vict., c. 100, s. 56, making child stealing felony; and ss. 53, 54, 55, punishing abduction in various cases; 48 & 49 Vict. ss. 7, 8, punishing abduction and unlawful detention.

children under fourteen, and this does not exhaust the category of persons who may be witnesses at a criminal trial. Kidnapping, in the strict sense of sending a prisoner to wrongful detention abroad, is doubtless prohibited under the Habeas Corpus Act, 1679¹ with as much efficiency as stringency. But the false imprisonment of any male person over fourteen years of age in this country is clearly very inadequately provided against as a Common law misdemeanour. The reason for the extraordinary defectiveness of the Criminal law as regards false imprisonment may have been the extraordinary severity of the Elizabethan statute against vagrants, by which it was made a felony, capitally punishable on a first offence, for a gipsy to remain one month in the country.² During the two hundred and twenty years this Act remained on the Statute Book it may have been thought that the mere terror it inspired (it was not enforced throughout that period) sufficiently restrained the offence of kidnapping by rendering punishable with death the continued sojourn in the realm of the very class of persons who were most likely to commit the offence. But the protest in East's *Pleas of the Crown* is repeated in the last edition of *Russell on Crimes*,³ and it may therefore be supposed that under ordinary circumstances neither false imprisonment nor even kidnapping could be punished except as Common law misdemeanours. But this objection to granting a new trial in cases of felony only remains till this defect in the Criminal law is not supplied. The mere raising of the topic of criminal appeal ought to afford the occasion for strengthening the Criminal law in the direction of increasing the punishment for false imprisonment or kidnapping, as was done long ago in the case of perjury and conspiracy to murder. The mere supplying of this

¹ 31 Car. II, c. 2.

² 5 Eliz., c. 20, and the reference to it in Blackstone's *Comm.*, 4, p. 165.

³ East : *Pleas of the Crown*, 1, p. 430 ; 3 *Russell on Crimes*, ed. 1896, p. 269.

defect would have the double effect of removing an objection to criminal appeal, and of providing adequately for the punishment of an offence far more heinous than many of the petty offences that, a century ago, were punished with death. In view of the very emphatic protests in East and Russell it is curious that Sir John Holker, in the speeches he made in 1878 introducing the celebrated Criminal Law Codification Bill, did not make any allusion to providing increased punishment for the offences of false imprisonment and kidnapping. It appears inadmissible to contend that a reform of the Criminal law, like criminal appeal, is to be rejected because of the pre-existence of another but perfectly remediable defect. The enormous importance of the subject is implicitly, if indirectly, indicated by the impressive sentence of Lord Campbell: "The due distribution of justice depends much more upon the rules by which suits are conducted than on the perfection of the code by which rights are defined." In 1878, criminal appeal was associated with the great proposal to codify the Criminal law. The repeated attempts to introduce criminal appeal seem implicitly to show it is a much more urgent reform of the Criminal law than codification.

In an eloquent passage at the conclusion of their pamphlet, Sir H. Poland and Mr. Cohen appear virtually to confine their objection to criminal appeal to an exhortation on their part to respite judgment on the subject, because there is no hurry.

In the language of a great authority on early English law, who is indubitably an authority for the existence of a power to postpone judgment in a capital case at the ancient Common law, if not for the pre-existence of some form of criminal appeal, Sir Harry Poland and Mr. Herman Cohen urge that—"nunquam in judiciis tantum imminet periculum, quantum parit processus festinatus."¹ There is doubtless a

¹ Lord Chancellor Fortescue's *De Laudibus Legum Angliæ*, ch. 53, p. 128.

difference between a plea for arrest of judgment by the Legislature as regards a legislative proposal, and arrest of judgment by the Court of trial before which a person is indicted.

But the above passage in the *De Laudibus Legum Angliæ* was relied on by C. S. Greaves, "the very learned editor of the fourth edition of *Russell on Crimes*,"¹ as indicating, *inter alia*, that at the ancient Common law an inquiry took place subsequent to a conviction for felony, though he considered that it did not appear how it took place.² The other authorities that C. S. Greaves on this occasion referred to as indicating the conclusion that the ancient Common law afforded an opportunity for deliberation after verdict, are *Coke upon Littleton*, p. 134b, and *Le Mireur à Justices*, ch. 4, p. 261.

The inquiry that took place subsequent to conviction was, it is submitted, the attaint procedure. If it was considered applicable, it is clear that there was implicitly appeal on point of fact in cases of felony at the ancient Common law. Where a writ of attaint lay, a jury of twenty-four tried the issue whether the previous jury had sworn falsely. The verdict of the second jury concluded the matter. There are undoubtedly cases in the ancient books that justify the conclusion that a writ of attaint lay in a criminal case.³ The fact that such cases do not appear to have been frequent does not militate against the view that a writ of attaint formerly lay in criminal cases, as the action of attaint was an infrequent form of action in any case, according to some thirteenth century statistics given by Sir Frederic Pollock and Prof. F. Maitland.⁴ Sir John Fortescue leaves the

¹ Cf. the observation of Whiteside, C.J., in *R. v. Fox* (1866), 10 C. C. C. 502, 505.

² Minutes of Evidence on the Bill for the Amendment of the Administration of the Criminal Law, *Parl. Pap.*, Session 1847-8, Cd. 523, p. 14.

³ Selden Society's Publications, Vol. I, *Select Pleas of the Crown*, p. 117, Piece 181. *Les Reports des Cases en Ley*, 11 Hen. IV, 50, 51; 34 Hen. VI, 6, 36.

⁴ *Hist. Engl. Law*, Vol. II, p. 565.

question open, whether a writ of attaint could be sued against a jury in a criminal case, as he merely states that any one who is "unjustly grieved" by a verdict could sue the jury by the writ. But the fifteenth century chancellor does not categorically confine the application of the writ of attaint to civil cases.¹ Sir Matthew Hale says somewhat faintly, speaking late in the seventeenth century of perverse acquittals in criminal cases: "I think in such cases the king may have an attaint."² But in *Groenvelt v. Burwell*³ Holt, C.J., concluded that "if in a criminal case the jury gave a hard verdict, no attaint lies." However, this opinion does not directly traverse Sir Matthew Hale's opinion, as Holt, C.J., was clearly speaking of "perverse convictions" while Sir Matthew Hale mentions "perverse acquittals" as liable to be reversed by writ of attaint sued for by the Crown.

A passage in Hawkins' *Pleas of the Crown*, it may be admitted, directly negatives the view that the writ of attaint lay in a criminal case, the reason alleged being that the jury would not be equally influenced with the fear of an attaint from either of the contending parties as in civil cases. In criminal cases, the jury would often be in great danger from a powerful prosecutor, while they could have little to fear from an injured criminal, who would seldom be in circumstances to make his prosecution formidable.⁴ There are, however, several reasons for doubting whether this passage in the *Pleas of the Crown* can be regarded as decisive of the question whether or not a writ of attaint lay in a criminal case. At the date of the appearance of Hawkins' *Pleas of the Crown*, during the Chief Justiceship of Lord Macclesfield,⁵ writs of attaint were falling into

¹ *De Laudibus Legum Anglie*, ch. 26, p. 59.

² 2 Hale, P. C. 310, referred to by Sir James F. Stephen in *Hist. Cr. Law*, Vol. I, p. 307.

³ (1699) Raym. Rep., 454, 469.

⁴ *Pleas of the Crown*, Bk. 1, ch. 27, s. 5; Beven's *Negligence in Law*, Vol. 1, p. 277 and note; Viner's *Abridgment*, Vol. 3. Title Attaint.

⁵ 1710-4; Lord Campbell's *Lives of the Chief Justices*, Vol. III, p. 16.

desuetude in all cases.¹ Again, the language of the passage where it is concluded that the writ of attaind did not lie in a criminal case is rather argumentative and hypothetical than decisively declaratory of the law. This passage² is further implicitly, if not expressly, directly contradictory to other passages in Hawkins, where it is assumed, if not asserted, that a writ of attaind lay in a criminal case.³ Finally, even if full force is ascribed to the passage in question, it does not preclude the view that the writ of attaind lay at the ancient Common law in a criminal case. All that it determines is that the writ of attaind did not lie in a criminal case after *Bushell's Case*.⁴

Finally, Blackstone very definitely states that if the verdict in a criminal case be notoriously wrong, the jury "may be punished and the verdict set aside by attaind at the suit of the king; but not at the suit of the prisoner."⁵ Sir James Stephen concludes that "anciently, it may be, though the contrary seems as probable, jurors who returned a corrupt verdict in a criminal case were liable to what was called an attaind at the suit of the king."⁶ It seems clear that the balance of probabilities is distinctly, therefore, in favour of the application of the writ of attaind to criminal cases, at least by the ancient Common law. The only authority against the conclusion in later times is the passage in Hawkins' *Pleas of the Crown*, but this, as has been seen, is contradictory to other passages in the same work. The statement of Holt, C.J., is perfectly consistent with that of Sir Matthew Hale and Sir William Blackstone, who limited the application of the writ of attaind to cases of perverse acquittal. But in early times the writ of

¹ Stephens' *Hist. Cr. Law*, Vol. 1, p. 307.

² Hawkins' *Pleas of the Crown*, Bk. 1, ch. 27, s. 5.

³ Bk. 2, ch. 22, ss. 20, 23.

⁴ 6 How. *St. Tr.*, 999 (1670).

⁵ 4 Bl. *Comm.*, 361; referring to 2 Hale, P.C. 310.

⁶ *Hist. Eng. Cr. Law*, Vol. 1, 306.

attaint indubitably lay also at the suit of the Crown in cases of perverse conviction.¹

The importance of the question whether or not the writ of attaint lay in a criminal case is decisive, as regards appeal on matter of fact, being an aspect of criminal appeal which is as much "covered by authority" as appeal on point of law.² The connection between appeal upon matter of fact and the attaint procedure is indicated by Sir Frederick Pollock and Prof. F. Maitland,³ but they do not discuss, or even raise, the question whether or not the writ of attaint lay in a criminal case.

The writ of attaint was abolished by sect. 60 of the County Juries Act, 1825,⁴ with a saving as to the punishment of jurors who consent to be embraced. Another trace of criminal appeal, both on law and on fact, arises in the circumstance that in the fifteenth and sixteenth centuries, criminal business, of an exceedingly important character, was brought into the King's Bench by *certiorari*.⁵ But in cases removed by *certiorari*, "a new trial may be moved for on the ground of misdirection, that the verdict was against the evidence, or on other grounds on which new trials are moved for in civil cases."⁶ In 1584, a new trial was had in a case of felony (murder) after an acquittal, with the consent of the prisoner.⁷ This case was strongly disapproved a long time afterwards by Sir Michael Foster in 1762.⁸ But it indubitably indicates that the practice in the sixteenth century was frequently to grant a new trial in cases of felony, since all the judges declared in *Mansell's Case* that

¹ Selden Soc. Publ., Vol. I, p. 117.

² In introducing the Criminal Appeal Bill 1906 to the House of Lords, Lord Loreburn, L.C., observed that "but a very small portion of this Bill was not already covered by high authorities."

³ *Hist. Eng. Law*, Vol. 2, p. 661.

⁴ 6 Geo. IV, c. 50.

⁵ Stephen's *Hist. Cr. Law*, Vol. I, ch. 4, p. 96, referring to 2nd Appendix to the 3rd Report of the Deputy Keeper of the Public Records.

⁶ Stephen's *Hist. Crim. Law*, Vol. I, p. 311.

⁷ *R. v. Mansell*, Anderson's Rep. 103.

⁸ Foster's *Cr. Cas.*, 31.

a new trial could be had even under such circumstances, and that there were several precedents, and that it was a familiar practice. Traces of the sixteenth century criminal practice lingered far into the nineteenth century. In 1847, Lord Campbell, L.C., Lord Denman, L.C.J., Baron Parke, and C. S. Greaves, all alluded to the circumstance that cases of felony were then occasionally tried at *Nisi Prius* at the Assizes. Lord Denman very definitively stated before the Select Committee of the House of Lords that he had tried cases of felony at *Nisi Prius* at the Assizes.¹ Baron Parke observed that—"strictly speaking, there is the same power of removing an indictment for felony as there is of removing an indictment for misdemeanour, though it is very rarely acted upon, but I have known an instance of it, and of a consequent trial for felony at *Nisi Prius*."² C. S. Greaves mentioned that "both felonies and misdemeanours may be removed; but there is this difference, that in misdemeanours you may set aside the verdict absolutely, whereas in felonies all you can do is to stay the judgment. *King v. Ellis* (6 B. & C., p. 145), is in point; it is the case of a man who was tried for stealing in a shop at Exeter. If the case goes down in that way, having been moved by *Certiorari* in the following term, the prisoner, if convicted, has the right to take any objection in point of law, or move on affidavits, or to take any objection on matters of fact."³ Other cases of felony tried at *Nisi Prius*, besides those indirectly mentioned by Lord Denman, L.C.J., and Baron Parke, and the one specifically alluded to by C. S. Greaves, are *R. v. Johnson*,⁴ *Turner's Case*,⁵ and *R. v. Scaife*.⁶ Till late into the nineteenth century, therefore, the practice of hearing cases of felony at *Nisi Prius* at the Assizes cannot be said to have fallen into complete desuetude. Therefore,

¹ Minutes of Evidence on the Bill for the Amendment of the Administration of the Criminal Law, *Parl. Pap.*, Session 1847-8, Cd. 523, p. 44.

² *Ibid. supra*, at p. 7.

³ *Ibid. supra*, at p. 16.

⁴ (1827), *Moody's Cr. Cas.*, Vol. I, 173.

⁵ (1829), *Ibid.*, p. 241.

⁶ (1852), 2 *Denison's Cr. Cas.* 513.

till that date, new trials might be had in cases of felony, and it was possible to have an appeal on fact as well as law in a case of felony. Sir Harry Poland and Mr. Herman Cohen appear to dismiss appeal upon matter of fact as a *non possumus*; unless, *semble*, the right is only conferred subject to very stringent limitations. Their objection to appeal upon matter of fact appears to be that it is not practicable to hear hundreds of criminal appeals annually. In the Parliamentary Paper referred to, Parke, B., considered that appeal upon matter of fact in criminal cases was "certainly practicable," but that the inconveniences would much out-balance the conveniences. Alderson, B., once observed that "the Criminal law proposes not a perfect rule, but being human, and therefore imperfect, must choose between conflicting inconveniences."¹ It is very difficult not to consider that the balance of convenience, as far as the granting of a right of appeal in criminal cases is concerned, is very different from what it was in 1847. Statistics quoted by Sir Samuel Romilly reveal the extraordinary fact that the number of persons committed for trial in 1817 is not merely relatively, but even absolutely greater than the average number of persons committed for trial during the ten years 1893—1904. The figures are 13,932 and 11,276 respectively.² The constant tendency of crime to diminish tends to diminish the argument against appeal in criminal cases arising from its inconvenience. It is also very difficult not to regard the steady diminution in the per-centage of acquittals as indicating the urgency of granting appeal in criminal cases. The question arises whether no inconveniences are incurred by the denial of a right of appeal in criminal cases. Inconvenience, to put it mildly, results from the conviction of innocent persons. That such instances of a miscarriage of justice are rare will not, in the minds of many persons,

¹ *O'Connell and others v. R.* (1844), 11 Cl. & Fin. 155, 288.

² *Life of Sir Samuel Romilly*, Vol. III, p. 284; Judicial Statistics, England and Wales, 1904; Part I, Crim. Statistics; *Parl. Pap.* 1906, Cd. 2871, p. 17.

obliterate the implicit conviction that the conviction of an innocent person is the most grievous "inconvenience" that can befall the administration of justice in this or any other country. Recent experience appears to confirm the view that, in the language of Lord James of Hereford, in 1883, error in criminal trials is, if not constant, far too frequent. It does not appear possible to neglect this argument; and many people will be inclined to regard it as decisive of the question. Assuming, for the moment, that it is not, it is submitted that the granting of a right of appeal upon questions of fact in criminal cases would prove an effective, and possibly the only way, of rendering "the boom in the popular press," which now follows on almost every conviction in criminal cases that appeals to the sense of tragedy, either improbable, or perhaps, even impossible of occurrence. In 1860 Mr. M'Mahon claimed as a probable and beneficial consequence of granting criminal appeal (it was then proposed to grant it both on points of law and matters of fact), that it "would put a stop to the excitement which was raised in the public mind whenever it became necessary to make an appeal to the Home Secretary."¹

The relation of insanity to crime affords an instance of a case where there is at least some ground for public agitation against either acquittal or conviction in a capital case. The controversy between the Courts and the medical profession arising from the narrow construction of the Macnaghten rules of 1843, would probably be settled within a very few months of the creation of a Court of Criminal Appeal, conferring a conditional right of appeal on matter of fact upon every person convicted on indictment. It seems also clear that it would be impossible any longer to shut out the Macnaghten rules from receiving construction from a Court sitting in *banc*. if there was an absolute right of appeal on point of law, as the issue is directly

¹ *Times*, 2nd February, 1860.

raised by the rejection of medical evidence.¹ It is probably the most important consequence of the appeal on point of law conferred by the Act of 1848, being in the absolute discretion of the judge, that the Court for Crown Cases Reserved has never delivered a considered written judgment on the relation of insanity to criminal responsibility.

But it is impossible to regard it as *cadit quæstio* that immunity from penal liability ought not to be conceded to persons who commit murder under an insane impulse which is irresistible. Not only is it a point on which there is a difference between the Courts and the medical profession, but the tendency of judges and legislators in the United States and the British Colonies is not to accept the *dicta* in Macnaghten's case as an adequate definition of insanity with reference to criminal responsibility.² In the United States, both the Supreme Court and the Courts of almost all the States recognize irresistible impulse as being a sufficient defence, even when accompanied by a knowledge that the act was wrong. But the history of the *Thaw Case* shows that the State of New York is an exception. In his summing-up in the *Thaw Case*, Judge Fitzgerald directed the jury that "irresistible impulses had no place in law." Sir James Stephen regards it as mere inference from the Macnaghten rules that an insane, irresistible impulse should be a sufficient defence.

But the experience of sixty years confirms the conclusion that it is impossible, in the present state of things, ever to expect that the answers of the judges to the questions of the House of Lords will be reviewed by a body of judges with a view to their complete elucidation; and hence the urgency of granting criminal appeal. In *R. v. Layton*³ Rolfe, B., observed that "Insanity was the most difficult

¹ Stephen's *Hist. Crim. Law*, Vol. II, p. 128.

² Archbold's *Pleadings, Evidence, and Practice in Criminal Cases*, p. 27 and note; Kenny's *Outlines of the Criminal Law*, p. 56.

³ [1849], 4 C. C. C. 149, 155.

question which could engage the attention of any tribunal. It was difficult to define it in words, or even in idea." Yet on such a subject, not merely worthy of, but even demanding, the attention of the body of all the judges, no information can be obtained except from the reports of the directions of single judges.¹ The relation of insanity to criminal responsibility has never been ascertained by a Court sitting in *banc.*, though there are several such decisions as to the effect of insanity on the validity of contracts and wills. This undesirable state of things must continue till there is a Court of Criminal Appeal. The Macnaghten rules would then receive construction from the body of the judges either on an appeal against verdict, or an appeal upon matter of fact, or else on an appeal upon point of law against the wrongful rejection of evidence.

The first recommendation of appeal upon matter of fact in criminal cases was that made in the Eighth Report of the Commission on the Criminal Law.² It was pointed out in this Report that the judges have no means of revising or rectifying any verdict for any mistake or error on the part of the jury, in point of fact, although it is manifest that if the facts are mistaken, the whole foundation of any legal judgment fails. It was proposed that both the Crown and the prisoner should have the right to move for a new trial. This right as regards the Crown was to be confined to cases where it could be clearly shown that the acquittal was the consequence of any perjury or other fraud practised on behalf of the defendant. A party ought not to be allowed to take advantage of a verdict obtained by wrong—"to allow him to do so would afford a very strong temptation to commit perjury to the great obstruction of criminal justice." In view of a very recent miscarriage of justice directly due to perjury, and to the fact that "at least 90 per cent. of the

¹ *Hist. Crim. Law*, Vol. II, p. 152.

² *Parl. Pap.*, 1845; *Cd.* 656, pp. 22, 23, 24.

prisoners who give evidence on their own behalf perjure themselves in denying the charge,"¹ it appears more than ever difficult to regard appeal upon matter of fact as a *non possumus*, since it may, on the above authority, be regarded as the efficient means of removing the great obstruction caused to criminal justice by perjury.

In almost all the legislative proposals to institute a Court of Criminal Appeal there has been a provision made for appeal upon matter of fact; the single exception being the Criminal Cases (Reservation of Points of Law) Bill, introduced by Lord Halsbury, L.C., in 1905. The judges, in 1892, also did not recommend re-consideration of questions of fact. But besides the recommendation of a bilateral right of appeal upon matters of fact contained in the report of the Royal Commission in 1845, Mr. Fitzroy Kelly in 1844 proposed to give every person convicted upon indictment an absolute right of appeal both upon point of law and matter of fact; in 1848 this was also proposed by Mr. W. Ewart on his introduction of his Appeal in Criminal Cases Bill to the House of Commons. In the same year Lord Campbell, on introducing the measure which ultimately became the Stat. 11 & 12 Vict., c. 78, observed, as regards appeal upon matter of fact, that the objections that it would cause delay and unduly favour a rich delinquent might be provided against. He did not proceed to indicate how this could be done. The fact that at the present day "in the United States there is an appeal on fact—of which no one but a rich man can avail himself"² receives an anticipated condemnation in the very clear and precise language in which Lord Campbell, sixty years ago, urged that "one mischief which was likely to arise from the institution of this right of appeal (upon matter of fact) was, that it might enable the rich delinquent so to delay the proceedings as to

¹ Cf. the remark of Mr. Justice Grantham in the Beck Commission Report; *Parl. Pap.*, 1904; *Cd.* 2315, p. 207.

² Sir H. Poland, K.C., and Mr. Herman Cohen's pamphlet, p. 47.

exhaust the public indignation at his offence by mere lapse of time.”¹ Lord Campbell, however, concluded that “if it should be thought that a right of appeal on the merits should be given as well as on questions of law, and if such a scheme should be considered practicable, he would be glad to render it all the assistance in his power.” In view of this opinion of Lord Campbell, that the condition of introducing appeal on matter of fact in criminal cases was its being practicable, it is of some interest to recall that, a very short time previously, Baron Parke had pronounced the opinion that appeal upon matter of fact was “a certainly practicable” procedure in criminal cases.

In 1847, Mr. Pitt-Taylor, the great authority on the Law of Evidence, stated before the Committee of the House of Lords that a prisoner ought to have the power of appealing on point of fact at the discretion of the Judge at the Court of trial. This is an alternative condition of appealing on fact under the Criminal Appeal Bill 1906, clause 1, the other alternative condition for the exercise of the right being the leave of the Court of Criminal Appeal. In 1847 Mr. Pitt-Taylor attributed importance to the annexing of the condition of the leave of the Judge to the exercise of the right of appeal in fact; he was opposed to an absolute right of appeal on fact which would entitle a prisoner in every case to move for a new trial.²

Sir Harry Poland and Mr. Herman Cohen, in their pamphlet (page 2), consider that the unrestricted right of asking the Court of Appeal for leave to appeal is tantamount to a kind of unrestricted right to appeal. There would seem to be a difference between appealing and asking leave to appeal, when it is either a question of an appeal on matter of fact or of an appeal on point of law. The Criminal Appeal

¹ *Times*, March 25th, 1848.

² Minutes of Evidence on the Bill for the Amendment of the Administration of the Criminal Law, *Parl. Pap.*, Session 1847-8; *Cd.* 523, p. 38.

Bill, introduced by Sir John Holker into Parliament in 1878, also proposed, but only when the discovery of new facts threw doubt upon the propriety of a conviction, to give leave to the person convicted to apply to the Court of Appeal for a new trial. This proposal was criticised by Lord Blackburn and his colleagues at the time as either opposed to the principle of trial by jury, or as leading to a necessarily inadequate inquiry on affidavits. In the latter case, it would be difficult to refuse the motion for a new trial, and therefore, in the case of evidence brought before the Court of Criminal Appeal on affidavit, Lord Blackburn and his colleagues in 1878 anticipated the view of Sir Harry Poland and Mr. Herman Cohen in 1906. But it does not appear contemplated by the Criminal Appeal Bill of 1906 that the evidence is to be brought before the Court on affidavit. It is apparently contemplated that witnesses should be called, even witnesses who were not summoned at the trial.¹ It was not considered by Lord Blackburn, in 1878, that conferring on a convicted person a right of appeal on fact, with the leave of the Court of Criminal Appeal, would amount to an absolute right of appeal on fact, if the Court of Criminal Appeal was to hear evidence on the motion, as was certainly contemplated by the Criminal Appeal Bill of 1906. There seems a great divergence between the view of Lord Blackburn and his colleagues, and that of Sir Harry Poland and Mr. Herman Cohen, as to what constitutes an absolute right of appeal on matter of fact.

On the same occasion on which Mr. Pitt-Taylor declared in favour of "a discretionary appeal" on matter of fact, Patteson, J., stated his opinion to be that it was imperative to create a Court of Criminal Appeal instead of the informal tribunal that then (1847) existed, and even considered that such a Court ought to have the power of setting aside the verdict of guilty and of entering one of not guilty. It is

¹ Cf. Clause 3 (3) of the Criminal Appeal Bill of 1906, and pamphlet, p 28.

remarkable to note that this recommendation of Patteson, J., is in terms embodied in the Criminal Appeal Bill of 1906.¹

But it is submitted that conferring upon a Court of Criminal Appeal a power of setting aside a verdict, conflicts even more with the principle of trial by jury, than conferring on it a power to decide the merits of an appeal on a motion for a new trial. But the latter power was declared by Lord Blackburn and his colleagues, in 1878, to derogate from the principle of trial by jury. It is submitted therefore that the better course is that recommended by Mr. Pitt-Taylor, that the motion for a new trial should be made before the Judge at the Court of trial. It seems to have been considered on various occasions that the condition of a successful appeal on fact would then be restricted to cases where the Judge considered the jury had exhibited prejudice against the prisoner.

In his great speech on the Criminal Appeal Bill of 1906, Lord Alverstone, L.C.J., observed that, "the certainty, the expedition, the justice of our criminal procedure had been the admiration of jurists of all civilised nations; but the bed-rock and foundation of all the system was the recognised duty of the prosecutor to make out his case, and upon the facts to satisfy a jury, and from the verdict of that jury there was no appeal."² The apprehension expressed by Sir William Blackstone that trial by jury will never be openly attacked, but that it may be sapped and undermined by the introduction of "new and arbitrary methods of trial," seems implicit in the protest made by Lord Alverstone against the proposal that the verdict of a jury should be reversed by a Court of Criminal Appeal.³ But cases like Habron's in 1876, Beck's in 1904, and Lewis' in the present year render it a matter of popular knowledge that when the discovery of new facts demonstrates a failure of justice to have occurred,

¹ Cf. clause 1 (3), par. (h).

² *Times*, May 23, 1906.

³ Blackstone's *Comm.*, IV, pp. 349-50.

the process by which the balance is struck in the scales of justice is not the verdict of a jury. Though the first verdict is not explicitly reversed, it is implicitly reversed by the granting of a free pardon on the ground of innocence. This most illogical procedure was described by Lord Denman, when Lord Chief Justice of England, as "an insult to an innocent man." It is no less unsatisfactory when it is granted, as it must be, to a person who has been justly convicted, but who has successfully appealed on a technical point. This was also pointed out by Lord Denman in 1847, and, very recently, by Sir Herbert Stephen, the learned clerk of the Northern Assize, in the columns of the *Times*. In 1878, Lord Blackburn and his colleagues recommended that, when doubt is cast upon the propriety of a conviction by the discovery of new facts, the Home Secretary should have the power of ordering a new trial upon his own undivided responsibility. But it is submitted that, on every ground, it is far better that a motion for a new trial should be made before a Court of Criminal Appeal. In 1883, when supporting the Criminal Appeal Bill of Lord James of Hereford (then Attorney-General), it was pointed out by Lord Russell of Killowen (then C. Russell, K.C.), that Home Secretaries, with the onerous and responsible duties which properly devolved upon them, were about the worst persons to decide questions arising at criminal trials. But a Court of Criminal Appeal could deal with a motion for a new trial as appeals are dealt with in civil cases. The exercise of appellate jurisdiction, as a necessary function of the judiciary, can be entrusted to no other individual or body of individuals.

Finally, as regards the respective merits of an appeal on point of law and an appeal on matter of fact, it may be observed that, in giving his evidence before a Select Committee of the House of Lords in 1847, C. S. Greaves observed—"If I must make an election between the two, I would certainly prefer an appeal upon facts to an appeal

upon law, because I am quite clear, in trials before learned judges, that mistakes more frequently take place in matters of fact than in matters of law; and it is obvious to anyone who considers the subject that mistakes in matters of fact generally go to the entire guilt or innocence of the prisoner, whereas a mistake in matter of law very frequently turns upon some technical point, where the prisoner has been guilty, either of an offence of the same degree, or some one very nearly approaching to it; as, for instance, a man may have been convicted of a forgery, and the document set out in the indictment may have been mis-described as an order, whereas it is a mere warrant for the payment of money. I only put that as an instance to show that a man may be guilty, and escape through a mere technicality in a point of law; whereas, I think, when he is convicted on a point of fact, it goes entirely to the guilt or innocence of the prisoner.”¹

It is now made a felony, by sect. 23 of the Forgery Act 1861, to forge a warrant for the payment of money, and the particular instance of an appeal upon point of law resulting in an implicit failure of justice mentioned by C. S. Greaves in 1847 could not now occur. But Sir John Holker, when introducing the Criminal Law Codification Bill to the House of Commons in 1879, alluded to “the unwarrantable distinctions which prevailed on the subject of forgery of different kinds of documents. It was a crime punishable with penal servitude for life for a man to forge a receipt for a few shillings; only a minor offence, punishable with fine and imprisonment, to fabricate an important contract or document, the forgery of which may entail serious loss.”²

The right of appeal upon matter of fact in criminal cases

¹ Rep. Select Comm. of the House of Lords on the Bill for the further Amendment of the Administration of the Criminal Law; *Parl. Pap.*, Session 1847-8; *Cd.* 523, p. 13.

² *Times*, April 4th, 1879.

was put on its highest footing by Lord James of Hereford, in his Criminal Appeal Bill of 1883. By his measure, Lord James proposed to confer an absolute right of appeal on matter of fact upon every person convicted on indictment; while, except in capital cases, it was then merely proposed to confer a conditional right of appeal upon point of law.

Matters of fact appear upon the record,¹ and may be appealed upon by writ of error.² The propriety of an appeal upon matter of fact, therefore, was admitted at a time when "right and justice and the substance of the thing were sacrificed to the science of artificial statement."³ It may be supposed that the great weight of Sir Harry Poland's opinions expressed in this pamphlet has influenced already a very recent criminal statute. This is the Prevention of Corruption Act 1906, which, by sect. 2 (6) provides that any person aggrieved by a summary conviction under this Act may appeal to a Court of Quarter Sessions. Under this Act a defendant may consent to be summarily proceeded against, although it is an indictable offence. In such cases Sir Harry Poland and Mr. Herman Cohen point out that a defendant has ordinarily no right of appeal to Quarter Sessions; and they consider it an anomaly that the Criminal Appeal Bill of 1906 did not give such a defendant a right of appeal. But in the specific instance of the Prevention of Corruption Act 1906 this objection has been avoided. As the law stands at present, without any criminal appeal in indictable cases, a person who elects to be dealt with summarily under the Prevention of Corruption Act 1906, appears to be a most unduly favoured person, as he gets a right of appeal in the precise instance in which other defendants are prevented by the Summary Jurisdiction Act 1879, sect. 27 (3),

¹ Chitty's *Cr. Law*, I, p. 719.

² *O'Connell and others v. R.* (1844), 11 Cl. & Fin., 155, 232.

³ Cf. the observations of Lord Russell of Killowen, L.C.J., in *R. v. Jameson* (1896), 2 Q. B. 425, 431.

from appealing at all. The only conceivable explanation of this right of appeal conferred by the Prevention of Corruption Act 1906, sect. 2 (6), is, that it was contemplated that a measure conferring a right of appeal upon persons convicted upon indictment would become law at an early date.

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VII.—CURRENT NOTES ON INTERNATIONAL LAW.

Lett v. Lett.

AN important case, *Lett v. Lett* (L. R. [1906], 1 Ir. 618), commented on in the August number of this magazine last year (Vol. XXXI, p. 472), is now reported (L. R. [1906], 1 Ir. 618). Lord Justice Holmes' judgment is well worthy of careful study. Whilst the Lord Chancellor and Lord Justice Fitzgibbon rest content with quoting *Carron Co. v. Maclaren*, and apparently set no limits to the Irish jurisdiction to prohibit Irish plaintiffs from taking foreign proceedings whenever the Irish Courts think fit, Lord Justice Holmes lays down what is submitted to be the true principle, that it is only in circumstances of an exceptional nature that such a course will be taken. When last we dealt with *Lett v. Lett* we were under the impression that the Argentine proceedings were prohibited, because the Irish Court considered that the whole marital relations of the parties were properly cognisable by the Irish tribunal which had already granted the wife a divorce *a mensa*, and that these Irish divorce proceedings were still, in a sense, alive. But it appears that this possible justification for the prohibition did not exist. It was on the mere ground that the wife had, by way of compromise in the divorce proceedings, contracted not to apply for further alimony, that she was

restrained from proceeding now in Argentina. Holmes, L.J., forcibly points out that, by the Argentine law, she may simply be seeking her own, as a marriage-partner entitled to a share of the joint property. On that view, she would not be contravening the contract of compromise at all.

It is perhaps open to much question whether injunctions against foreign proceedings ought ever to be granted. In cases where the foreign Court is, upon our principles, exceeding its jurisdiction, so that its decree would not be enforced here, there may be something to be said for such a course. But in any other case, the transparent device of asserting that the English Court does not presume to interfere with the foreign one—that all it does is to prevent suitors in England from resorting to it—is quite an unsatisfactory, though a very ancient, excuse. The Courts would make short work of anyone who should answer a charge of interfering with the course of justice by the plea that he had no idea of interfering with the English Court when he coerced individuals from resorting to it.

The Personal Statute.

The authority of the personal statute, be it *lex domicilii* or *lex civitatis*, appears to have passed its zenith. The fact is hardly realised yet; indeed, many people would say that the personal law was only now coming to its own. But as Mr. Dicey reminds us, a principle is never recognised as triumphant until it is beginning to show signs of decay. One reason for thinking that the principle of the personal law is declining in importance is the tremendous extension, in late years, of the doctrine of "*ordre public*." Whenever the application of the personal law is disliked, it is evaded by the simple process of declaring that the private law relation concerned is "*d'ordre public*," i. e., that its universal enforcement within the State territory is matter of public import-

ance. It is obvious that there are no limits to this process. Of no private law institution can it be predicated that it has nothing to do with the interest of the public for whose benefit it was made. Another sign of the times is the emphatic re-assertion by Deane, J., of the uncompromising theory of the late Lord Hannen, according to which the *lex loci actus* is the law, and the only law, decisive of the capacity of parties to contract matrimony.

In *Ogden v. Ogden* (L. R. [1907], P. 107) the judge expressly adopted Lord Hannen's language in *Sottomayor v. De Barros* (L. R. [1879], 5 P. 94), declaring that restrictions upon and prohibitions against marriage must be measured by the law of the place where it is solemnized; and he distinguished *Sottomayor v. De Barros* (L. R. [1877], 3 P. 1) on the ground, reserved by Cotton, L.J., that in the latter case *both* parties had a common foreign personal law. He did not advert to Professor Westlake's suggested explanation of the still earlier case of *Simonin v. Mallac* (2 S. & T. 77), which would justify it on the ground that the obstacle to validity was really one of form only and not one of capacity, being the absence of certain consents, which, if only the proper form had been observed, would have been dispensed with by the personal law itself. That explanation would not have applied in the case before him, as the domiciled French consort was under twenty and unable to dispense with consent at all. It is very well to protect English women, but the question is whether it should be done at the expense of foreign minors. The domiciled Frenchman in *Ogden's Case* was nineteen, but he might as easily have been fifteen. *Brook v. Brook* ([1861], 9 H. L. C., 193) laid down a simple rule, viz., that the forms of marriage are regulated by the place of marriage, but the capacity to marry by the personal law of the parties; and it is obvious that this is quite counter to the doctrine of

Hannen and Deane. In *Brook v. Brook*, however, the facts were distinguishable—there, as in the earlier aspect of *Sottomayor's Case*, both parties had a common domicile, foreign to the *locus*, British in the one, Portuguese in the other. Convinced adherents of the territorial school of d'Argentré and Grotius, will decidedly approve of the solution of Hannen and Deane. But it is fundamentally inconsistent with any wide application of the personal statute. And we are very much afraid that the English Court would not hold a marriage valid which should have been entered into by a domiciled Englishman in a foreign country with a domiciled foreigner with whom he had not by English law capacity to marry. In fact, Cresswell, J., who decided *Simonin v. Mallac* (and there upheld a marriage contracted by a Frenchman, against his personal law, in England), in *Mette v. Mette* (1 S. & T. 416), held that the marriage of an Englishman, contracted against his personal law, in Frankfort, with a domiciled Frankfort lady was *invalid*. This is not even a case of *res magis valeat quam pereat*, but is much like a case of "heads I win, tails you lose," unless we support *Simonin v. Mallac* on Westlake's ground, that the apparent want of capacity was really there a matter of form merely.

The *Sussex Peerage Case* (11 C. & F. 152) is parallel with *Mette v. Mette*. And a still stronger assertion of the authority of the personal law is to be found in the Colonial Marriages Act 1906. This statute, "for the removal of doubts," distinctly announces that marriages between a person and her deceased sister's widower are valid if celebrated between parties who are permitted to contract such unions by the law of their respective (colonial) domiciles. Still, this may be subject to the reservation that the law of the place of celebration must *also* be complied with, because the statute says that such marriages are good "if otherwise valid."

The authorities for and against the admission of the personal law as decisive in this matter are therefore, on

the whole, tolerably equally balanced. Much criticism has been directed against the decisions according to which the status of "prodigal" is refused recognition in England when imposed by the individual's personal law. Now, however, it appears that the French Courts themselves decline to recognise the status of "prodigal" imposed by the *statut personnel*. Deferring to the personal law in theory, the Bordeaux Court declares that it must not be applied when the result would be prejudicial to Frenchmen in France who have been guilty of no negligence and had no actual knowledge of the incapacity. Clunet (1906, p. 1119, *aff. Schwabach - Marzdorf*) criticises this decision, but it is grounded on much the same reasoning as *Ogden v. Ogden*. Yet, "unless we wish to render illusory the protection afforded to persons labouring under an incapacity, it must be admitted that everyone who enters into a contract must see for himself as to the capacity of the other party." (Clunet). On the whole, the difficulties and embarrassments created by the admission of a personal law in matters of contract are such that the simplest and most satisfactory course is to make the stranger take the risks of venturing on to strange territory in this as in other matters, and to uphold the *lex loci acti*. And this, we think, is the end towards which the most recent French and English judgments are unconsciously tending. It is, at any rate, infinitely preferable to the solution which concedes that people carry a personal law about with them, but that at some unascertained point *l'ordre public* steps in and snatches it away. Besides, there is a patent fallacy in the whole idea of an individual's carrying about with him the stamp of his capacity, impressed upon him by some particular law—(we even hear of his "enjoying the benefit of" his personal law; as though a beneficent government gave it to him to put in his pocket). Capacity is a two-sided thing: a law regulating capacity, if it is a command to anybody, is a command, not so much

to the individual himself, as to other people. And how can the propriety of issuing orders to other people be most properly measured by considerations of the nationality or the domicile of the individual in respect of whom they are given? On the other hand, if we do not look upon law as a command, but as the expression of a common consciousness, how can the common consciousness of the rules regulating capacity be an affair solely of the community to which the individual concerned (by nationality or domicile) belongs? It is equally the affair of the community to which the people belong with whom he tries to contract.

The Moray Firth Case.

It is pleasurable to read the statesmanlike utterance of Lord Fitzmaurice, delivered in the House of Lords on this vexed question on February 21st, 1907. Trained in the school of Granville and Clarendon, the speaker has a firm hold on the fundamental principles of the Law of Nations, which compares favourably with that displayed by many professed exponents of the science. The aim of the latter not infrequently appears to be the unsettlement of established principles. They forget that it is of less importance that the law should be perfect, than that it should be certain. Lord Fitzmaurice gives full weight to the advantages to be derived from an extension of territorial rights over a wider area of the sea. He knows the benefits which such an extension would confer on the fishing industry. But he deliberately subordinates these considerations to the enormous interests which, as he says, are to the fisheries as round shot to a grain of sand, and which are inseparable from the principle of the freedom of the seas. The government, he avowed, had released Norwegian trawlers who had been imprisoned in Scotland (in default of payment of fines), for trawling outside the three-mile limit. That was only in accordance with the uniform practice of Great Britain.

"He could certainly say that, according to the views hitherto accepted by all the Departments of the government chiefly concerned—the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade, and the Board of Agriculture and Fisheries— . . . territorial waters were:— First, the waters which extended from the coast-line of any part of the territory of a State to three miles from the low water-mark of such coast-line; secondly, the waters of bays, the entrance to which was not more than six miles in width, and of which the entire land boundary formed part of the territory of a State." This is a clear and distinct proposition, which may be taken as an accurate statement of the law. Lord Fitzmaurice mentioned that the American counsel in the *Behring Sea Case* relied on this Scottish fishery legislation as showing that Great Britain claimed international jurisdiction far out at sea: and that on that occasion the British counsel retorted that it was perfectly plain that these Acts had no international bearing, and that in the construction of our statutes "any person" means "any person subject to the jurisdiction." He added that instructions had been given to the fishery cruisers to limit their activities, in the case of foreign vessels, to the ascertainment of facts with a view to the prosecution of individuals, who, if British subjects, might subsequently be served with process in this country. The illegality of such examinations of foreign vessels in peace time is hardly doubtful, if it extends to actual boarding. Probably it is meant to be limited to observation.

On the interesting question whether any foreign vessel had actually been interfered with outside the three-mile limit, the noble lord said that such a case had in fact occurred, the fishery cruiser *Freya* having brought in the trawler *Sando*; but almost as soon as the boat arrived, the local authorities received a telegram from the Fishery Board, instructing them to release her at once. It seems

to us that this was a case for an apology and compensation.

The least satisfactory feature in the Norwegian contention is that these Norwegian vessels are said to be used by Grimsby trawlers, who cannot safely use their own. Even so, Norway is within her rights in allowing the ships to be manned by anyone, if she is willing to assume responsibility for them: and so Lord Fitzmaurice thought. Lord Reay spoke in hearty concurrence with his main thesis, as befitted so distinguished an international jurist.

Newfoundland Fisheries.

The Imperial Statute (59 Geo. III, c. 58) relied on by the Colonial Office to justify the Government in interfering with the administration of the Colonial law in Newfoundland, seems very inadequate for that purpose. It confers power on the Crown, by Order in Council, to make such regulations, and to give such directions, orders and instructions, as shall be deemed proper *and* necessary for the carrying out of the Treaty of 1819, with relation to the taking, drying and curing of fish by inhabitants of the United States of America. It cannot possibly be said that it is "necessary," in order that strangers may have the agreed liberty to fish, that they should also have liberty to buy bait. The sort of interference that is contemplated by the Act is such as is really required to secure the very rights conferred by the treaty; and, as delicate questions might arise as to what steps are in fact necessary, the steps thought necessary for that purpose by the Crown in Council are held to be permissible. The Act (repealed by S. L. R. Act, 1878) of 5 Geo. IV, c. 51, throws light on this point. General authority is given to the Crown to give proper and necessary instructions to the Governor of Newfoundland, and the Naval officers on the station, to secure the fulfilment of treaties—and the Statute particularises instructions to commit

such acts as the removal of fishing stages, boats and works, and the deportation of individuals, *from the coast open to alien fishermen*. Apart from such measures, imperatively called for by the necessity of preserving that coast free from interference with the conceded rights, the Act contemplates no derogation from the general law of Newfoundland. Moreover, Newfoundland in those days was a Crown Colony; and it is arguable that by the concession of responsible government in 1832, the Imperial Crown resigned its Statutory, as well as its Common law, powers of interference with the colony (*In re Bishop of Natal*, 3 Moo. P. C. (N. S.) 115), at any rate when exercised in direct conflict with colonial laws.

T. BATY.

VIII.—NOTES ON RECENT CASES (ENGLISH).

THE question as to the income a life tenant is to receive from unauthorised investments has given the Courts much trouble, and cannot be said to be as yet settled in a clear or satisfactory manner. This very well appears from three cases reported since the commencement of the year. In *In re Bates, Hodgson v. Bates* (L. R. [1907], 1 Ch. 22), where a testator left the income of his personal estate to his widow for life, and upon trust for conversion, but with power to his trustees to "retain any investment," and the trustees retained certain shares in a coal mining company, Kekewich, J., held that the widow was entitled to the full income on such shares. He went on the ground that they were hazardous but not wasting securities, but intimated his own opinion, that had they been unquestionably wasting securities the decision should be the same. This would not be inconsistent with *In re Chayter, Chayter v. Horn* (L. R. [1905], 1 Ch. 233), since in that case there was a trust for sale, and the income of the proceeds of the sale was alone

given to the life tenant. But in *In re Earl Darnley, Clifton v. Darnley* (L. R. [1907], 1 Ch. 159), there was a trust for sale of land and only such a gift to the life tenant and no power to postpone conversion, and the same Judge held that the life tenant was entitled until sale—provided the sale was not improperly postponed—to all the rents and profits of the land, though a large part of those profits consisted of mining royalties, which of course are payments for the sale of part of the settled property. This case follows another of his lordship's decisions—*In re Searle, Searle v. Baker* (L. R. [1900], 2 Ch. 829)—and proceeds on the ground that there is a distinction between the rules applicable to real and to personal estate. The old case of *Fitzgerald v. Jervoise* (5 Madd. 25) seems to be the sole authority for this, and it does not give and nobody seems able to suggest any reason for the distinction, while in *Yates v. Yates* (28 Beav. 637) neither counsel nor Judge refers to it. There were formerly other distinctions taken for which no reasons could be given, as to the different effects of a direction to convert in the case of realty and personalty, but these have all now completely disappeared. Lastly, in *In re Wilson, Moore v. Wilson*, (L. R. [1907], 1 Ch. 394), where there was no trust for conversion, and the entire income was given to the life tenant, Swinfen Eady, J. (L. R. [1907], 1 Ch. 394), decided that the life tenant was entitled to the full income on unauthorised securities retained under a power of retainer, but went expressly on the ground that the whole income of the trust property was given. Here of course the property was personalty, but his lordship, who appeared to doubt the distinction between wasting and merely hazardous securities (see p. 397), in giving judgment, simply said he could not distinguish the case from *In re Sheldon* (*supra*) and *In re Bates* (*supra*).

As a repealed Act of Parliament is often very effective so a void condition is frequently very useful. This happened

in *In re Wright, Mott v. Issott* (L. R. [1907], 1 Ch. 231). There trustees were directed by the will to let a lady hold a house free of rent, subject to a proviso thereafter contained and to her residing in it "during her lifetime"—the proviso was that she should "remain single and unmarried," and on her marriage the bequest was to be forfeited. With the usual perversity of her sex the lady married and then ceased to reside in the house. It was claimed thereupon that the forfeiture arose. Not so: the two conditions neutralised each other. The condition in general restraint of marriage was of course bad in law, but it must nevertheless be read in order to see what the other condition meant. Put together the two conditions clearly indicated that the testator did not intend that the lady should reside in the house after she married, and so therefore after her marriage she was entitled to the house for her lifetime, free from the condition as to residence. If the testator could only be informed of this decision, how surprised would he be to discover what, in truth and in fact, his real intentions were, though without fault on his part he was unaware of them.

It would be well for conveyancers to note the distinction in a conveyance of land of reserving and excepting from the conveyance "all mines and veins" of certain minerals under the land, and merely reserving the privilege of winning and disposing of such minerals. The first reserves to the grantor his whole estate in the mines and all the subjacent and superincumbent strata needful for the proper removal of the minerals. The second confers a mere easement and profit *à prendre*. Consequently it was held in *Batten Pooll v. Kennedy* (L. R. [1907], 1 Ch. 256), that in the first case the grantor is entitled to do what he likes in the strata reserved from the conveyance—such as make a tunnel through them for the purpose of removing minerals from other mines not under the land granted.

The reversal by the Court of Appeal in *H. Leitham Ltd. v. Johnstone White* (L. R. [1907], 1 Ch. 322) of the decision of Neville, J., is satisfactory as far as it goes. It merely decides that where an agent contracts on behalf of a number of different firms with a person to accept service under any of them, a covenant, restraining such person from following his trade after leaving the firm's service, to be reasonable must be such only as is necessary for the protection of the business of that particular firm he actually served, and not of all the firms on behalf of whom the agent contracted with him. But it may be doubted whether the criticisms of Farwell, L.J., on the remarks made by Neville, J., in the Court below on the injustice of the law, are themselves justified. Here the covenant extended to all the United Kingdom, and it was held to be unreasonable, because the particular firm the man served did not carry on business in all parts of the country. But Buckley, L.J., at p. 329, intimates that if the firm he had served had carried on business in all parts of the country—as another of the plaintiffs in fact did—the covenant would have been reasonable. From which it seems that there is, in the opinion of the learned Lords Justices, no hardship in the law being invoked and rendering it possible to prevent a man earning his living in his own land, provided that it is for somebody else's benefit that he should not be allowed to do so. It was just the fear of this result which led the older Judges to maintain the doctrine that such covenants were contrary to public policy.

Lodge v. National Union Investment Company Limited (L. R. [1907], 1 Ch. 300), raised a peculiar point, namely, whether different relief may not still be obtainable in a Court of Law from that obtainable in a Court of Equity. In that case a borrower sued in the Chancery Division an unregistered money lender for the recovery of certain securities

he had deposited with him to secure a loan, on the ground that the contract for the loan was void under the Money Lenders Act, 1900. Parker, J., refused to make the order except on the terms that the borrower would repay the loan. If the borrower had brought an action in the King's Bench Division would the Court impose any such condition? His Lordship had serious doubts, but held, that as the relief sought was equitable, it would only be granted on the principle that he who seeks equity must do equity.

It was held in *Davis v. Hutchings* (L. R. [1907], 1 Ch. 356), that constructive notice that a *cestui que trust* has charged his interest in trust funds, is sufficient to make the trustees liable if they part with the funds, and that the fact that they parted with them owing to their agent withholding notice of his own fraud, did not entitle the trustees to relief under the Judicial Trustees Act, 1896. As to both points *sed quare*.

J. A. S.

Dawes v. Wilkinson (L. R. [1907], 1 K. B. 278; 76 L. J. R., K. B. 182) is concerned "with the liquor called rum" as Mr. Stiggins, with a proper regard for his clerical dignity loftily described the particular vanity to which he was least averse. A retailer of the enticing cordial may still imply his loyal concord with legislative enactments by displaying a notice that the spirits he sells will, "in order to comply with the Sale of Food and Drugs Act, not be of any guaranteed strength": readiness to comply with the law is one of the marks of good citizenship. And he may still reduce such liquors to a fixed per-centage below proof; but to ameliorate them further by an infusion from the water-main is to misinterpret the intention of Parliament, and supererogatory assistance to the Legislature by any such abatement of the ferocity of the original spirit will not be approved by the Courts.

For brevity and comprehensiveness Lord Justice Moulton's summary is an excellent one of what is encompassed by "privilege" when a business communication is held to enjoy that protection. It is in *Edmondson v. Birch & Horner* (L. R. [1907], 1 K. B. 371; 76 L. J. R., K. B. 346), and is to the effect that all incidents of the transmission and treatment of such a communication which are in accordance with the reasonable and normal course of business are covered by privilege. In this particular case it protected the telegraphing by a public code of a disparaging statement to a foreign port, where the person referred to was resident and well-known.

Though money paid into Court under Order XXII in an action for damages is to be "taken to admit the claim or cause of action in respect of which the payment is made," and though r. 5 of the Order recognises a preferential claim of the plaintiff to such money which has been paid in without denial of liability, yet the discretion of the Court or Judge is paramount. And this jurisdiction continues when either party dies before judgment. In *Brown v. Feeney* (L. R. [1906], 1 K. B. 563), the defendant died during the action, and the Court ordered the money to be paid to the plaintiff. In *Maxwell v. Lord Wolseley* (L. R. [1907], 1 K. B. 274; 76 L. J. R., K. B. 163), the plaintiff died before trial, and the Court of Appeal have held that the Judge had discretion to order that money which had been paid in without denial of liability should be handed to the plaintiff's executors.

Fortune is precarious and water was ever unstable, so that affluence derived from a well or a stream fed from springs invisible must always have an unguarded frontier. *Acton v. Blundell* and *Chasemore v. Richards* are household words to fill with foreboding the usufructuary of such water

sources if he has a neighbour given to deep delving. And a water company is a delver for profit, the strongest of motives. Over land acquired by the Defendants in *English v. Metropolitan Water Board* (L. R. [1907], 1 K. B. 588; 76 L. J. R., K. B. 361), a stream, rising a few hundred yards from their boundary, flowed, probably immemorially, in a definite channel into the plaintiff's land and turned a mill there. A well was sunk by the defendants and though, by the well being lined with steel cylinders for 76 feet from the surface, the stream was protected in its channel, the volume of water which reached the land of the plaintiff was much diminished. But, as was to be expected, the cases against him were too firm to enable him to get relief. *Chasemore v. Richards* showed that such an injury is not actionable, even when the abstracted water is used for purposes quite unconnected with the land of the excavator. There was nothing in the case to show that the surface stream had itself been directly tapped.

The interesting appeal of *Bullock v. The London General Omnibus Company and others* (L. R. [1907], 1 K. B. 264; 76 L. J. R., K. B. 127), would not have been heard but that Bray, J., in an action for tort against two defendants jointly and alternatively, ordered, for excellent reasons, that costs which the plaintiff would have to pay to one defendant who had been successful in his defence should be recovered from the other against whom damages had been adjudged. The claim in the case was for injuries received by the plaintiff in a collision between vehicles belonging to the defendants respectively; and in order to upset the decision as to costs, it was necessary for the appellant to contend that there is no jurisdiction to try a case of tort against plural defendants when separate causes of action are alleged. The appeal might have been dismissed on the ground, without more, that the verdict of a jury having been given it was too late

to object to the jurisdiction. But fortunately the Court went further. The contention which the appellant urged has been, in its completeness, extensively held in regard to tort as opposed to contract. Some decisions favour it. The *Annual Practice* has always had appended to Order XVI, both before and since the amendment of 1896, a note that r. 1 deals only with joinder of parties and has no reference to joinder of causes; and in *Bullen and Leake* is a note that r. 6 enables a plaintiff to join all persons who are jointly, severally, or alternatively liable on any contract. But the Court held that at any rate where a plaintiff is in doubt whether an injury of which he complains was occasioned by the joint act of two or more persons, or was the sole act of one or other, he may, under rr. 1, 4 and 7 of Order XVI, join them all as defendants.

As to the costs, it was held, independently of earlier cases, that under the combined effect of Order LV, r. 1, and sect. 5 of the Judicature Act 1900, it was competent for the Judge to make the order appealed against.

To give into custody a person whom the jury acquit of the offence charged against him may have civil consequences to the prosecutor, but *Sewell v. National Telephone Co., Limited* (L. R. [1907], 1 K. B. 557) rightly holds that these will not attach to him for merely signing the charge sheet when the person accused has been arrested by the police.

Oppenheimer v. Attenborough and Son (L. R. [1907], 1 K. B. 510), *Oppenheimer v. Frazer and Wyatt and another* (L. R. [1907], 1 K. B. 519). These cases present more difficulty, perhaps, than a good many of those which the Bench sometimes admit to be perplexing. But as Channell, J., had been occupied with them for a week and had read up all the cases which bore upon them, his judgment is a matured one. The first-named is the simpler of the two. A diamond merchant, who from the exigencies of business

had frequently availed himself of the prompt rescue which the pawnbroker affords to the embarrassed, pledged with the defendants diamonds which he had obtained from the plaintiff on the false assertion that he had a named customer for them. In the second case, the same resourceful intermediary procured from the same plaintiff, on the same pretence, diamonds which he in turn entrusted for sale to a person who disposed of them for him to Messrs. Frazer and Wyatt, on condition of sharing the profit or loss which the purchase might bring. The defendants in both cases acted quite *bonâ fide*, and the question arose who was to suffer the loss. Evidence was forthcoming that it is not the custom of diamond merchants to entrust an agent with precious stones for the purpose of pawning them. But as the object of the Factors Act was, in the interests of commerce, to afford a sense of safety to persons who from their abundance lend on solid security, it would be unfair and contrary to the purpose of the Act that in a particular market a custom should be set up the effect of which would be to contract out of the Act; and so the decision was rightly in favour of the defendants.

But the second case is more complex. Larceny by trick was set up by the plaintiffs. A leading case in that form of fraud is *Rex v. Buckmaster* (L. R. [1887], 20 Q. B. D. 182). But Channell, J., rejected the plea, and ruled that though the diamond merchants had a custom of their own which accorded with the Common law, yet, under the Factors Act which extended the Common law, the fraudulent person came well within the definition of a mercantile agent. And the judgment stands that the purchasers, the defendants named in the second case, had a legal title, but that the other defendant who introduced the business and was to share the profit of the deal, was, on the ground that he had means of obtaining knowledge of the fraud projected by the person who employed him, liable to the plaintiff for the value of the goods.

T. J. B.

IRISH CASES.

If any gift is to be held charitable, the element of public benefit must in some way enter into it, whether by relieving poverty, advancing education or religion, or otherwise. And a gift, which is in the popular sense "charitable" (*i.e.*, benevolent) may be far from being legally charitable. These familiar propositions are neatly illustrated by a rather curious case of *Laverty v. Laverty* ([1907], 1 Ir. R. 9). There a testator gave the income of his property in trust to "pay towards the support and education in Ireland of any Roman Catholic boy or boys, man or men, of the surname of Laverty, being between the ages of eleven and twenty-three years, until such boy or man shall have attained a trade or profession, such sums as the trustees shall think proper." Now obviously, under the terms of this gift, the trustees might have applied it, either to the education of some fortunate Laverty, or to his support apart from his education, even though he were not a poor or necessitous person. No doubt the testator did not mean that; but the wide discretion given to the trustees left his words open to that construction. This amounts to saying that the terms of the gift were consistent with its administration on the lines of mere private bounty. For that reason the Court had no difficulty in holding it non-charitable, and therefore, as tending to a perpetuity, void.

The nature of what is popularly called the "bonus," payable on sales under the Irish Land Purchase Act 1903, is a matter of some interest to English as well as to Irish lawyers. Indeed, it has already come under the decision of an English Court (Kekewich, J.), in *Annaly's Estate* (53 W. R. 150). English settlements do sometimes include Irish land. Where a landlord sells to his tenants his estate, in the method provided by the Act of 1903, then under

section 48 of that Act the State pays to the landlord-vendor an additional sum, calculated by way of per-centage on the purchase-money. Suppose that the landlord's interest is in settlement, as probably will be the case: what becomes of this per-centage or bonus? Is it like capital money under the Settled Land Acts? *Ely's Estate* ([1904], 1 Ir. R. 66) and *Annaly's Estate* (*ubi supra*), both decided that it was like capital money, and was captured by and subject to the trusts of the settled land. This was over-ruled by a special little statute, the Irish Land Act 1904, making the bonus payable to the vendor even though he is a limited owner. But there still remains the question, how is it affected by a covenant to settle after-acquired property? Upon this some light is thrown by *In re Power's Estate* ([1907], 1 Ir. R. 51). There a marriage settlement contained a covenant to bring into settlement wife's after-acquired property "not hereinbefore settled." The settled property came to be represented by lands, which were sold to tenants under the Act, and the question arose as to whether the bonus were captured by this covenant. Wylie, J., held that it was payable to the wife herself, and was not so captured. It was in the nature of an estate or interest in the settled land, and therefore came under the expressed exception in the covenant as being property "hereinbefore settled."

As in most cases depending on questions of intention, it is difficult to extract any general principle from those dealing with the applicability of the well-known rule in *Howe v. Lord Dartmouth* (7 Ves. 137), as to the conversion of wasting properties. It is plain that when you have a residuary gift of personalty, including wasting properties such as leaseholds, to persons in succession, then *primâ facie* the rule applies, and those properties ought to be converted for the benefit of the remaindermen. The onus rests on the person saying that the rule ought not to be applied

(*Macdonald v. Irvine*, 8 Ch. D. 101) ; but any clear indication of the testator's intention that it should not apply is sufficient to oust it. When we ask what is such an indication of intention, we come into the welter of authorities. At all events, *Lyons v. Harris* ([1907], 1 Ir. R. 32), is an instance of a will which the Court considered to contain no indication of an intention that the wasting property should be enjoyed *in specie* by successive owners. The residuary gift was in trust to pay A. an annuity of £250, subject thereto to pay the income to the testatrix' husband during his life, and after his death to B., C. and D. in certain shares. Then followed a direction that if A. died without issue, the incomes so provided for should be increased by the amount of his annuity ; but that if he died leaving issue, the annuity should be paid for the benefit of his children till they attained twenty-one, when out of all the property combined in the gift a sum of £4,000 was to be raised and distributed as directed. Holmes, L.J., frankly admitted that "in cases of this nature it must be a matter of guess-work, what the testator would have directed, if the particular question under discussion had been brought to his attention at the time when the will was made." Most people will agree in this, and in the Lord Justice's conclusion that "it is therefore important to follow a rule of law if we have one."

Greer v. Greer ([1907], 1 Ir. R. 57) is an example of the kind of Chancery case which really turns upon facts, which illustrates only a well-known principle, and to which the Reports are over-hospitable. The principle in question was the surely well-settled rule that a legal mortgagee can only be postponed to a subsequent equitable mortgagee of the same property by showing fraud, or negligence so gross as practically to amount to fraud, against such legal mortgagee. In the present case, the legal mortgage

was made in 1884, was registered, and had had interest regularly paid on it ever since. But in 1901 the mortgagor had made an equitable mortgage to a bank, by deposit of the title-deeds of the same property, and had thereupon represented to the bank that the estate was unencumbered. By reason partly of the deaths of the original parties, no explanation was forthcoming as to how the deeds had been in the possession of the mortgagor at the date of the second mortgage, nor any evidence pointing to fraud on the part of the legal mortgagee or to negligence by him, except in so far as the mere non-possession of the deeds might be considered negligence. The Court had little difficulty in holding that the mere non-possession of the deeds was not sufficient to work a postponement.

Facts such as those in *Collins v. Collins* ([1907], 2 Ir. R. 104) are not likely to be of very common occurrence, but the case may be noted as showing that even claims under the Workmen's Compensation Act must stop somewhere. A. is in B.'s employment, laying drain-pipes. Some wanton and probably drunken persons amuse themselves by breaking the pipes, which B. orders A. to protect. On further damage being done, A. (under B.'s direction) demands payment from the wrong-doers; this leads to an altercation, and B., taking part therein, is knocked down. A. goes to his rescue, and in so doing receives a stab, from the effects of which he dies. Is his murder an "accident arising out of and in the course of his employment," within sect. 1 of the Act of 1897, so that B. will have to pay compensation for it? No, say the Court of Appeal. It is not conclusive that it was caused by a tortious or even criminal act of an outsider, for that may come within the section; but the test is whether it was a risk reasonably to be contemplated by the workman in undertaking his employment (*Challis v. L. & S. W. Ry.* ([1905], 2 K. B. 154). Plainly, the laying

of drain-pipes does not ordinarily, in a country even moderately civilized, lead to the murder of the person engaged therein. Such an accident may occur "in the course of" his employment, but hardly "arises out of" it.

J. S. B.

SCOTCH CASES.

Last quarter we noted the case of a will under which it was sought to cover a highland estate with statues, in memory of the testator and his brothers and sisters. The will was held void, not from uncertainty but from the total absence of any beneficiary to compete with the heir-at-law (*M'Caig v. University of Glasgow*, 44 S. L. R. 198). Another "somewhat eccentric bequest" was dealt with by the same Division about the same time (*Murdoch's Trustees v. Weir*, 44 S. L. R. 173). Here the testator left the whole residue of his estate to be employed in "instituting and carrying on a scheme for the relief of indigent bachelors and widowers of whatever religious denomination or belief they may be, who have shown practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose." The Lord Ordinary (Johnstone) held the will void from uncertainty, but the Second Division reversed and sustained it.

The Lord Ordinary's argument was that the bequest was too vague to be practically applied. Three very pertinent questions had been stated in argument, viz.:—(1) What is science? (2) What is sympathy with science? and (3) What is *practical* sympathy with science? In the first place, the Lord Ordinary did not know what the testator meant by "science," or rather what he did not mean to

include in science. In university or educational parlance it has come to be restricted to certain branches of knowledge where, for convenience, science is distinguished from languages, divinity, and even from mathematics. But the Lord Ordinary could find no justification for restricting the testator's bequest to the professors and amateurs of science in the university sense. "We might as well," he said, "confine the term religion to the Christian religion. Where then is it to stop? The devotees of every cult appropriate the term to the subject of their devotion, from the phrenologist and the believer in Christian science to the patron of the prize ring." The Lord Ordinary found similar difficulties in determining the meaning of "sympathy in the pursuits of science," and particularly the meaning of "*practical* sympathy" in this connection.

The Inner House viewed the subject from a different stand-point. With the possible exception of Lord Kyllachy, they did not concern themselves with definitions of science, but were content to found upon the fact that the bequest was for the benefit of "indigent" persons, and was thus stamped with the character of charity. According to the Lord Justice-Clerk, its primary object was "the giving of relief to persons in circumstances of poverty. The intention being thus, on the face of it, charitable, can any limitation which the testator prescribes, by which the class of persons to be selected is limited, deprive the gift of its charitable character?" His lordship did not think so, and Lords Stormonth-Darling and Low concurred. Lord Kyllachy stated that if he had been sitting alone he would have concurred with the Lord Ordinary; but he was not prepared to enter a formal dissent.

The case of *Brown v. Ross, etc.* (44 S. L. R. 213), excited considerable interest in the Scottish capital. The action was at the instance of a lieutenant of police against the

Corporation of Edinburgh and the Chief Constable. So far as directed against the Corporation, it was dismissed by the Lord Ordinary (Johnstone) in July last, but at the same time it was sent for trial as against the Chief Constable. The Chief Constable appealed, with the result that the First Division have now dismissed the action as against both defenders. The substance of the pursuer's averment was that he had been maliciously dismissed by the Chief Constable, because of some alleged slanderous statements bearing upon the Chief Constable's private character. The pursuer averred that the Chief Constable had conducted a kind of mock trial, with himself as Judge, jury and executioner, and had conducted the proceedings oppressively and with malice. The defender, the Chief Constable, pleaded that, under the statutes governing the police force of Edinburgh, he was "authorised and empowered to appoint proper officers" for the various grades of the police force, and "to suspend and remove such constables appointed by him at pleasure." The Lord Ordinary was of opinion that while the statute precluded all inquiry into the reasons of the dismissal, it did not preclude inquiry into the *motives* of dismissal. The Inner House could not take this view of the relevancy. In the words of Lord M'Laren, who gave the leading opinion:—"The distinction the Lord Ordinary has taken is unsound and unworkable when applied, as he proposes, to judicial proceedings. It comes to this, that whenever a dismissed officer of police comes into Court with a circumstantial statement charging the Chief Constable with indirect motives, the Chief Constable is to be amerced in damages if a jury thinks he acted unfairly. I do not stop to consider whether any person having money or a character to lose would accept the post of Chief Constable under such conditions."

The Corporation of Glasgow has been placed in a difficult position by the judgment of the House of Lords in two

cases which were taken together (*Hamilton and others v. Nisbet; Caledonian Railway v. Glasgow Corporation*; 44 S. L. R. 392). In both the unanimous judgment of the Court of Session (seven Judges), was affirmed. The cases were test ones, to determine the validity of the procedure of the Corporation in fixing the width of public streets for the purposes of a statutory register, by a straight line equidistant from the centre of the street, irrespective of actually existing buildings belonging to private proprietors. It was held, both by the Court of Session and by the Appellate Court, that the private Act obtained by the Corporation did not empower the local authority to take private property for public purposes, and that the width of the registered street must have relation to the existing width. The statute referred to (the Glasgow Buildings Regulations Act 1900), provided a mode of appeal to the Sheriff of Lanarkshire, the consequence of which was, that no less than 5,000 appeals were entered. To save the enormous labour placed upon the Sheriff by requiring him to deal separately with all these appeals, test cases were taken to the higher Courts with the result mentioned. But the mere preparation and entering of each appeal cost the appellant from two to three guineas, including 5s. of Court dues, which in each case were inexorably exacted by the Court official. If, therefore, the appeals follow the usual rule of being sustained with expenses, the Corporation will, in addition to the expenses of the cases actually fought out, be liable to pay in expenses a sum, which at the lowest estimate will amount to £10,500, of which £1,250 represents outlay paid to the clerk of Court.

R. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER
LENGTH IN SUBSEQUENT ISSUES.]

The English Reports. Vols. LVI to LXXI. Vice-Chancellor's Court, 1—16. Edited by M. A. ROBERTSON and G. ELLIS. Edinburgh: William Green & Sons. London: Stevens & Sons. 1906-7.

This great undertaking is now well on the road to completion. The series at present under review comprises the whole of the Reports in the various Courts of the Vice-Chancellors, prior to their amalgamation in the Equity Reports in 1865. The Vice-Chancellors lasted from Eldon to Selborne: but they only became conspicuous in the world of English jurisprudence from 1841 onwards. The first of their line, Plumer, was not the best, and the second, Leach, was probably the worst. He held the office nine years, during which more bad law was accumulated than the combined efforts of the Lord Chancellor and of Time were able to remove. It was better to be "right, but dull and long" with his successor, Hart, who became in a few months Chancellor of Ireland. Shadwell, who held the office for the long period of twenty-three years, and obtained no higher preferment, is the Vice-Chancellor of England *par excellence*; but he was hardly a great Judge. The abolition of the Equity Exchequer occasioned in 1841 the appointment of two additional Vice-Chancellors. Knight-Bruce, Turner and Wood, speedily became Lords Justices; but Wigram and Kindersley are memorable Vice-Chancellors *pur sang*. Stuart was of lesser calibre, and does not find his way into the *Dictionary of National Biography*. Parker only survived his elevation to the Bench for a few months. Lord Cranworth makes a meteoric appearance as a Vice-Chancellor (and Lord Justice) on his way to the woolsack.

The Reports, as was natural, are multifarious. Maddock's and subsequently Simons' cover the ground up to 1841, after which Simons, Simons and Stuart, Drewry and Drewry and Smale proceed with the Court presided over successively by Cranworth and Kindersley, whilst Young and Collyer attached themselves to Knight-Bruce, and Hare took up Wigram's Court. Young and

Collyer's joint Reports *coram* Knight-Bruce are succeeded by those of Collyer, and of De Gex and Smale. The fifth and last volume of De Gex and Smale contains the decisions of Parker. Smale and Giffard's three, with Giffard's five, volumes, embody those of Stuart. After Wigram's resignation, Hare continued to report his successors, Turner and Wood, and Wood's decisions are completed to 1865 by Kay, Kay and Johnson, Johnson, Johnson and Hemming, and Hemming and Miller. There was a duplicate report published in 1845 by Holt, which included all the Vice-Chancellors, but was soon discontinued.

Few of these reporters obtained distinction. Stuart became a Vice-Chancellor, and Kay a Lord Justice of Appeal. Though the former was a Stuart of Appin, and the son-in-law of Duncan Stewart, his judgment in the case which involved the guardianship of the young Marquis of Bute (Disraeli's *Lothair*), himself also a Stewart, was an emphatic repudiation of the claims of the Courts in Scotland to regulate the minority: *The Marquis of Bute v. Stuart* (2 Giff. 582). This was upheld by the House of Lords (9 H. L. C. 440), and Lord Campbell's language on that occasion was the subject of a dignified and merited rebuke by the great Inglis, then Lord Justice-Clerk. The work of Turner, Knight-Bruce and Wood, is better estimated from their appellate judgments. Parker's law is very highly spoken of by contemporaries. Wigram, V.-C., had to decide (in *A.-G. v. Welsh*, 4 Ha. 572) the questions which arose on the formation of the Free Church, analogous to those which were recently raised by the creation of the United Free Church.

A word of tribute must be paid to the conscientious care with which the full text of the volumes reproduced is presented to the reader. Every case is reprinted, and the occasional suppressions of extraneous matter are scrupulously chronicled. Take, for example, the following entry from Vol. LVI: "The following pages have been omitted:—2 Madd., 146; 3 Madd., 317, 318, 392 (Obsolete Orders of Court); 3 Madd., 190; 4 Madd., 360; 5 Madd., 172; 6 Madd., 136 (*blank in original*) . . ." Caledonian carefulness could go no further. Seriously, it is of the utmost importance to the practitioner to be provided with every case, whether thought likely to be of value or not. It is essential that such a collection as this should be complete, otherwise it is an assemblage of elegant extracts. The fact that the reprint is a faithful transcript of the

original increases its value tenfold. The paper and typography leave nothing to be desired, and are by this time familiar to most of our readers. The various cases are noted up to the present date—a decidedly useful feature. We observe that the King's Bench series has now been entered upon, and we shall await with interest its progress and publication.

The International Law and Diplomacy of the Russo-Japanese War.
By A. S. HERSHEY, Ph.D. London: Macmillan & Co. 1906.

We are inclined to think this the best book which has yet appeared on the subject. Professor Hershey evinces a grasp of principle and a disinclination to wander in the wilderness of theorising which are in the highest degree commendable. Praiseworthy, also, are his absolute fairness and detachment from prejudice. The book is not solely concerned with jural problems, but offers a readable narrative of the events which led up to the recent war. References to authorities are full, and important documents are set out *in extenso*, but the Author never avoids the responsibility of coming to a conclusion on debatable points. Incidentally, Professor Hershey throws out a remark on "municipalizing" International law which strikes us as very valuable. He warns the student against the excessive deference sometimes paid to decided cases, and reminds us that International law can never be satisfactorily taught by the "case system." It is a danger which will have to be carefully guarded against as the Hague Tribunal develops. Occasionally the Author relies too strongly on documents which are admittedly hypothetical (*e.g.*, pp. 12, 21, 194), and we should be glad to believe that Russia has, as he seems to think, paid an indemnity of £100,000 for the *Knight Commander*. It is with some regret that we notice that he gives encouragement to the fable that the yacht *Deerhound* rescued the *Alabama's* crew by arrangement. The unsophisticated narrative of the owner (a Northern sympathiser) is sufficient to convince anyone that he was actuated simply by the British instinct for affording asylum to distressed fugitives—an instinct which, it is to be hoped, will not be balked in future by high-flying theories of neutral duty. And the suggestion that the Royal Yacht "Association" to which he belonged is a semi-official body is calculated to raise a smile. The style of the work is clear and pleasant, though naturally Americanisms occur. "Premier Balfour" sounds a proud title, but we doubt

whether its recipient will be altogether as pleased with it as he ought. In fine, without agreeing with all the Author's conclusions, we unhesitatingly recommend his book.

Essays: Critical and Political. By J. H. BALFOUR BROWNE, K.C. 2 vols. London: Longmans, Green & Co. 1907.

Criticism of the literary qualities of Mr. Browne's essays will not be expected in a legal review. One Kiplinesque phrase is, nevertheless, worthy of respectful comment. "Socialism," says Mr. Browne, "made the lily-livered blanch as to their cheek"—a progress of pallor which can only be compared with Levitical leprosy. The Author has many sensible things to say upon the Collectivist deluge. But when he tells the world that the only alternative to Socialism is Tariff Reform—(does he think there are no Socialists in Prussia?)—Free Importers will perhaps console themselves by recalling that the fiery advocate of religious education in 1906 was also the author of the bitter diatribe against the Church which appears in this volume as written in 1877. Not pretending to pronounce on these high matters of taste and politics, we prefer to draw our readers' attention to the Essay on Artistic Copyright, in which the Author discusses the position of pictures sold with no stipulation as to the copyright in them. He treats the dry subject with the greatest freshness and independence. It is curious how some writers have their pet words of objurgation: Mr. Browne's is "haggard"; and he uses it generously.

The Principles of German Civil Law. By E. J. SCHUSTER, LL.D. Oxford: The Clarendon Press. 1907.

Dr. Schuster's workmanlike book will be valuable alike to the student and to the practising lawyer. It is gratifying to notice that with the spread of private and commercial relations between the inhabitants of different countries, legal science is prepared to respond to the consequent demand for light to be thrown on foreign systems of law. Such works as that of Mr. Ernest Todd on Belgian law, and that which is now before us on the law of Germany, tend to have an increasing value. The compilation of the book must have entailed immense labour; and, so far as we can judge, it is throughout most careful and accurate. The Author's wide acquaintance with Foreign law, and with the theory of law, enables him to make his exposition illuminating as well as thorough and complete. He

draws special attention to the inveterate tendency of English lawyers to regard Agency as primarily and almost exclusively a matter of contract; and points out how a comparison with even a single foreign system would have cleared up this misconception which leaves such a dangerous *lacuna* in our law.

Year Book Series. Vols. II & III. Edited for the Selden Society by F. W. MAITLAND. London: Bernard Quaritch.

We imagine that few will share the avidity of Serjeant Maynard for the old year-books, who "carried one in his coach to divert him in travel, and said he chose it before any comedy." Perhaps in the days of that learned Serjeant there did not exist the flood of light literature which overwhelms us at the present time. The name of Professor Maitland on the title-page is a guarantee that the work will be scholarly and thorough. Professor Maitland was, up to the time of his death, Literary Director of the Selden Society, and his efforts were chiefly directed towards drawing a vivid and imaginative picture of daily life in ancient England. The two volumes under review include 2 & 3 Edward II, and 3 Edward II—that is to say, the years 1308 to 1310. The old precedents, given in old French, together with the English translation, read very quaintly to the modern lawyer. It is often said that there exists an increasing tendency on the part of the Bench of the present day, to interject remarks in the course of counsel's argument. After reading the reports of cases tried in those past days, this reproach would appear to be all unmerited. Bereford, C.J., seems to have been a prime offender, and did not trouble to hide his feelings and opinions in the slightest degree. Professor Maitland has been very successful in his translation of the quaint old French expressions, but the following remark of Bereford, C.J., is not very illuminating: "If you let it come to a decision, by the faith that I owe you, you will have to warrant with the sauce"! The Selden Society is doing a great work in reviving ancient law, and this work of Professor Maitland's will rank high in the result of the efforts of the Society.

Borough Customs. Vols. I & II. Edited for the Selden Society by Miss MARY BATESON. London: Bernard Quaritch.

In the motto of this work is contained the best description of its merit, *περί παντός τὴν ἐλευθερίαν*. In the course of compilation many obscure authorities have been consulted, the recital of which

occupies some thirty-five pages. The learned authoress died in December of last year, and an eloquent tribute was paid to her memory and work by Sir Alfred Wills when presiding at the Annual Meeting of the Selden Society. Volume I deals with personal actions, also real and mixed actions. Under the first heading is comprised Crime and Tort, Procedure in Personal Actions, Customs treating of various forms of Debt, Breach of Covenant, Principles of Liability, and Law of Apprentices. Under the second heading is comprised Disseisin and Fresh Force, Writ of Right, Official Delivery of Seisin, Waste, and Landlord and Tenant. Volume II treats of the Procedure adopted in Borough Courts, the officers connected with the Borough, the scope and constitution of the Borough Court itself. Further is given a mine of interesting information concerning Seignorial and Family law, including that very important subject, Husband and Wife. These two volumes, apart from any other work, would alone have stamped Miss Bateson as being a writer possessed with the unusual ability of dressing up in fascinating garb a subject too abstruse for the every-day reader. How many law students, or for that matter, how many lawyers would be tempted to read a work of this nature? but any that do, will be amply repaid. It will be found that this old law and lore, extracted from Borough records and ancient Manuscripts, contains the germ from which has evolved the present English law in all its splendour. In conclusion, we can only congratulate the Selden Society on having obtained the services of such an able scholar, and deplore the fact that death has deprived us of any further fruits of her erudition.

The Annual County Courts Practice 1907. By His Honour Judge SMYLY, K.C., and W. J. BROOKS. London: Sweet & Maxwell.

The Yearly County Court Practice 1907. By His Honour Judge WOODFALL and E. H. TINDALL ATKINSON, assisted by W. JARDINE and MORTEN TURNER. London: Butterworth & Co.

As the legislature imposes fresh burdens on the Judges of County Courts, so must books on practice in these Courts increase in size. When one looks at the Indexes it is a matter for wonder that more mistakes are not made than at present. Admiralty, Probate, Explosives, Infants, Money Lenders Act, Pharmacy Acts, and Tenants' Compensation are a few of the many subjects dealt with by County Court Judges in addition to the ordinary matters which come within their jurisdiction. Small wonder, then, that books of practice

have to be most carefully constructed and made easy of reference. The busy practitioner knows only too well how essential it is for him to be able to place his hand at a moment's notice upon a point of practice, whether in Court or in chambers. The two works under review have both well-established reputations, the justification for which is to be found in the names of the learned Authors appearing on the several title-pages. Mr. Pitt Lewis, as an expert in County Court Practice, was a great loss, but a worthy substitute has been found in the person of Judge Woodfall, who, as a member of the Rule Committee, has done yeoman service. That the *Annual County Courts Practice* is still edited by Judge Smyly is ample proof that the work will be thorough and efficient. There does not appear to be an extravagant amount of alteration to the Practice: some six Rules have either been added or amended. We may look forward to increased litigation by reason of the passing of the Workmen's Compensation Act 1906, which, however, does not come into force until July 1st of this year. The *Yearly County Court Practice* has the different subjects dealt with stamped on the front outside of the book, which adds somewhat to ease of reference; also the same part of the book is coloured alternately red and white, which tends towards the same object. Both works, however, will be found to be sound and useful, and will be used according to taste by members of the legal profession.

Second Edition. *Jurisprudence.* By J. W. SALMOND. London: Stevens & Haynes. 1907.

Two works of Professors in the Southern hemisphere are notable in English legal literature. We refer to Hearn's *Government of England* and Salmond's *Jurisprudence*. It is pleasant to see that the latter has reached a second edition in its enlarged and improved form. As to its admitted great merits we need say little, except to remark that it is of distinct value to the practising lawyer, as well as the theorist. Neither the Author, nor Professor Jethro Brown (whose revised "Austin" we noticed last February), seems to us to appreciate the force of the criticism which the historical school of jurists directs against the idea that the threat of State-enforcement is a necessary element of law. It is not enough to dismiss early and remote societies as not possessing law, but only something which is very like it. That is to beg the question; for the very point of the criticism is that the rules prevalent in these societies

would be styled their "laws" in the ordinary use of language and in the commonest sense of the term. The illustration which the Professors give is irrelevant, and we can only wonder that it should have occurred to them as a good one. Man, they say, may have developed out of apes; that is no reason for defining "man" so as to include apes. True, but would anybody call an ape a man? Some writers get over the difficulty by frankly saying that the jurist abandons the popular conception of a law, and deals with a conception which he manufactures for himself. In that case it does not appear that he is doing anything conspicuously useful.

Second Edition. *International Law as interpreted during the Russo-Japanese War.* By F. E. SMITH and N. W. SIBLEY. London: T. Fisher Unwin. 1907.

In putting forward the second edition of this work the Authors have excised much matter which seemed to them of merely temporary interest, supplying its place by additions in other directions. They have made many corrections, yet there still seems scope for more: the case of the *Knight Commander* is referred to in the Index as dealt with on pp. 186, 187, 189, 465, where it is not to be found. The great learning displayed by the Authors deserves cordial recognition; but the impression is created that a much more succinct treatment of the questions dealt with would be more effective than the method actually adopted. Among the matter now elided is the discussion of the French *Règlements* alleged to justify the destruction of neutral prizes, on which we commented when reviewing the first edition. The unwarrantable inference is drawn from the case of the *Eagle* (5 C. Robins. 401, not 385), that the doctrine of continuous voyage was regarded in 1803 as applicable to contraband. The inferior Court had there condemned the cargo as contraband; but the Court of Appeal, in declaring "But the only question here (*i.e.*, in the C. A.), was with regard to the continuity of the voyage," *ipso facto* dismissed the question of contraband altogether. By omitting the conjunction "but" the Authors make this less apparent than it becomes on consulting the report. The voyage was, in fact, a continuous colonial one (Bilbao—Havannah). If the cargo had been considered contraband, where was the need to establish a continuous voyage? It was taken *en route* direct for Havannah, an enemy's port, and it did not matter where it had come from. How this can possibly be regarded as a parallel case to that of the *Bundesrath*, where the ship was taken

on a voyage to a neutral port, one cannot conjecture. The principal value of the book lies as before in its carefully accumulated facts, which are here assembled from so many diverse sources, and include such recent documents as the Portsmouth Treaty, the Anglo-Japanese Treaty, and the Japanese-Korean Treaty.

Second Edition. *The Government of India.* By Sir COURTENAY ILBERT, K.C.S.I. Oxford: The Clarendon Press. 1907.

The first edition was published in 1898. It was based on the revised draft of a Bill to consolidate the enactments relating to the Government of India, the first draft of which was, we believe, drawn by the late Sir Fitzjames Stephen. This Bill was never submitted to Parliament, but at the suggestion of the India Office Sir Courtenay Ilbert developed it into a Digest of the Statute Law relating to India. The case for consolidation of the statutes is particularly strong when it is remembered that "the Government of India is a subordinate Government, having powers derived from and limited by Acts of Parliament. The enactments on which its authority rests range over a period of more than 120 years. Some of these are expressed in language suitable to the time of Warren Hastings, but inapplicable to the India of to-day, and unintelligible except to those who are conversant with the needs and circumstances of the times in which they were passed." A consolidating Act would repeal and supersede more than forty separate statutes relating to India. The first chapter is devoted to a Historical Introduction, which gives shortly but clearly the origin and growth of the East India Company, and the many difficulties they had to deal with both at home and abroad, until in 1858 British India was by the Government of India Act 1858 placed under the direct government of the Crown, though the East India Company was not formally dissolved till 1873. Chapter II gives a summary of the existing system of administrative law in India. The third chapter, which is much the longest in the book, gives the Digest of the Statutes. It is divided into twelve parts and contains 124 sections. All these sections are fully annotated with references to all the statutes, and what perhaps we may call the historical practice. The interesting chapter on "Application of English Law to Natives in India," is, we are told, based on a paper read before the Society of Comparative Legislation. We would particularly call attention to the last two pages where the Author discusses how far codification is desirable in the case of

Hindu and Mahomedan law, and comes to the conclusion that there are great difficulties in such a task, and that the time for it has not yet arrived. The fifth and last chapter deals with a difficult and important subject, and one that will, perhaps, interest English lawyers more than those discussed in the preceding ones. It is headed *British Jurisdiction in Native States*, and begins with an examination of the principles applying to extra-territorial legislation in England in order to consider what modification those principles may require in their application to India. The Author points out the limited classes of cases in which the English Parliament has legislated for offences committed out of British territory. He then examines the Foreign Jurisdiction Acts, and sketches the origin of consular jurisdiction illustrated by the history of the Levant Company. Special consideration is given to the manner in which the powers under these Acts have been applied to African protectorates by Orders in Council, and some important conclusions are drawn "as to the classes of persons and cases with respect to which jurisdiction may be exercised by Courts established by Orders in Council in accordance with the Foreign Jurisdiction Acts." In considering the application to India of the principles so laid down some material differences are pointed out, such as the limitation of the powers of the Indian Legislature; but the following important general conclusions are drawn, with which we must conclude our notice of this interesting work:—(1) The extra-territorial powers of the Governor-General of India are much wider than those of the Indian Legislature, and are not derived from, though they may be regulated or restricted by, English or Indian Acts. (2) These powers are exercisable within the territories of all the Native States of India. Whether they are exercisable within the territories of any State outside India depends on arrangements with the Government of that State, and the powers of the Crown delegated to the Governor-General. (3) Jurisdiction under these powers might be made to extend, not only to British subjects and subjects of the State, but also to foreigners.

Second Edition. *Everest and Strode's Law of Estoppel.* By L. F. EVEREST. London: Stevens & Sons. 1907.

This text-book is well known and highly thought of in the legal world. It is to be regretted that Mr. Strode, one of the former collaborators in the first edition, has been unable to give his valuable

assistance in bringing out the second. Mentioning this fact must not be taken as casting any reflection on the work of the present Author, who has completed his task with great ability. The first edition was produced early in 1884, and since then there has been the decision in the case of *Brunsdon v. Humphrey* (L. R. [1884], 14 Q. B. D. 141), memorable as producing a luminous judgment of Bowen, L. J., which so clearly enunciated the principles underlying the doctrine of "*interest rei-publicæ ut sit finis litium*." In that case the terseness of the judgment of Coleridge, C.J., who differed from the majority of the Court, Brett, M.R., and Bowen, L.J., must be almost historical in a case of such magnitude. The book has avowedly followed Lord Coke's three principal divisions of the Law of Estoppel, and therefore presents a model of form. Considerable additions have been made in the present edition, which is only to be expected after an interval of twenty years. All the new decisions have been incorporated, and the text has been brought quite up to date. Appendix C. gives some new and interesting facts bearing both upon the history and law of Estoppel by fine and recovery, as well as an illustration from the Year Books of the use of the rebutter in a real action. Considerable information has been added to the part dealing with Estoppel by conduct, especially that part treating of the liability of masters and principals for the acts, especially the dishonest acts, of their servants and agents. The subjects of joint liability, Estoppel by waiver and election, and foreign jurisdiction, have been very considerably amplified and revised. We think that the Author has attained a very high pitch of excellence in the chapter treating with Foreign Matrimonial Sentences, and we have rarely seen the subject of Foreign Sentences of Divorce so clearly and completely dealt with. The Author appears to appreciate fully, and to give due weight to, the case of *Le Mesurier v. Le Mesurier* (L. R. [1895], A. C. 517), a thing which is not always done by other learned writers. If the former attitude of the Courts had been preserved, hardly anyone with an English domicile of origin would have dared to have procured a divorce of an English marriage elsewhere than in England. Even now the whole question is not altogether free from doubt and uncertainty, a fact which is well appreciated by lawyers in our colonies. We feel certain that the present work will appeal to a very large circle of legal readers, and will maintain the very high reputation acquired by the first edition.

Second Edition. *Trade Union Law.* By HERMAN COHEN. London: Sweet & Maxwell. 1907.

The Trade Disputes Act 1906 has had among other effects that of considerably altering the form of Mr. Cohen's useful little book. The historical introduction which Mr. George Howell contributed to the first edition is now omitted, as being no longer of sufficient interest now that the Taff Vale controversy is a thing of the past. The decisions in a large number of leading cases, such as *Allen v. Flood*, *Quinn v. Leathem* and others, have become obsolete. Mr. Cohen describes the conspicuous changes as consisting of "an alteration in the law of conspiracy, amounting in the case of an union to abrogation; the abolition of actions for tort against an union; the abolition of what Sir Godfrey Lushington aptly called 'the tort of trade interference,' and a relaxation of the law of picketing." It is interesting after this to try to discover in what respects trade unions are amenable to the law, or whether they have, as we have heard it described, been set above the law, and whether Trade Union law is only "a code for the regulation or non-regulation of the internal affairs of the societies." It seems to be uncertain whether an action can still be brought against an union for an injunction; and it would seem that the trustees of a trade union can be sued under the Trades Union Act, 1871, sect. 9, for torts committed in or arising from the use of the union's property.

Third Edition. *The Law of the Domestic Relations.* By W. P. EVERSLEY, B.C.L., M.A. London: Stevens & Haynes. 1906.

It was quite time Mr. Eversley brought out a new edition of his learned work on domestic relations, and we are interested to note that, although there has been an interval of ten years, there have not been in his opinion "any new principles of law affecting the subject-matter of this treatise laid down either in the Statute Book or in the judgments of the Courts." Even in the law of Husband and Wife, which may be said to be the most important part of the book, occupying, as it does, rather more than half, there has been but little alteration beyond the power of giving evidence for or against each other contained in the Criminal Evidence Act 1898. A small breach has been made in the defences of the restrained married woman by the decision of the House of Lords, allowing her judgment creditor to attach the income accrued due up to the date of the judgment. Apart from this, as the learned Author remarks with some bitterness,

"Married women, subject to this artificial fetter, are as free as ever to commit frauds and shirk their liabilities (and some of them avail themselves of their opportunities)." His remarks on this subject, and also on the frauds practised by married women carrying on in their own names the trades of their bankrupt husbands, and the converse, where a wife carries on a business through her husband, are well worth perusal and consideration. Mr. Eversley also calls attention to the increased interference with "parental and tutorial control of young persons." The Courts have been given large powers to deprive undesirable parents or guardians of the custody of their children. The last Licensing Act punishes a person who is drunk while in charge of a person under seven; and a very remarkable piece of legislation, 1 Edw. VII, c. 20, renders any guardian who is shown to have conduced to the commission of an offence by a young person under his care, either by wilful default or habitual neglect, liable to pay the fine, damages or costs imposed on the young person, and to find security for its good behaviour. The fifth Part, which treats on Master and Servant, will have to be altered in the next edition by the addition of the Workmen's Compensation Act 1906, which was framed after the publication of this work. This valuable and exhaustive work shows an amount of care and learning which render it a most valuable guide on the important subjects on which it treats.

Fourth Edition. *The Local Government Act*, 1894. By A. MACMORRAN, K.C., M.A., and T. R. COLQUHOUN DILL. London: Butterworth & Co. 1907.

The two learned authors of this notable work are too well known to the legal profession to need introduction. Both of them experts on Local Government law, their knowledge is practical as well as theoretical. The third edition was brought out in 1896, so that it is quite apparent that a new edition was required. During the last ten years quite a mass of legislation has been passed dealing with the subject-matter of this work; notably the Parish Councillors (Tenure of Office) Act 1899, which altered the period of office of a Parish Councillor from one to three years. The Commons Act 1899 and the Open Spaces Act of 1906 are also noteworthy additions to the Statute Book. The notes to the principal Act have been completely overhauled, brought up to date, and amplified. That part of the principal Act which deals with guardians and district councils

has been to some extent re-written, and the authors excuse themselves for dealing so fully with a subject so much outside the scope of their work. On reading this part of the volume, inasmuch as it seems germane to the subject of Local Government, an apology is hardly necessary. The Appendix is very full and well arranged, and includes the Orders now in force with respect to the election of Parish Councillors. The Index is very complete and illuminating; if, however, we might venture a small criticism, it would be that some of the items appear rather unnecessarily verbose. We feel certain that not only the legal profession, but also the great public which is so much interested in Local Government, will welcome the new edition of this work, which is quite up to the standard of former editions, and again reflects great credit on the legal acumen and industry of the two learned authors. The Open Spaces Act of 1906 was passed when the present edition was in type, so, although placed in its proper place, this particular Act possesses a paging all its own, an excellent idea and one which prevents the breaking up of the ordinary paging of the whole book.

Fourth Edition. *A Treatise on Statute Law.* By W. FIELDEN CRAIES, M.A. London: Stevens & Haynes. 1907.

Mr. Craies has at last assumed the merit which is justly his, and describes the present volume as founded on *Hardcastle on Statutory Law*. He is careful to indicate so much of the text of the original edition as has been preserved after the numerous alterations and additions made in successive editions by its inclusion in square brackets. The most notable additions are contained in two chapters which have been added. One, Part II, chapter 3, is on "Subordinate Legislation." By this is understood rules, regulations or by-laws made under statutory powers. This branch of law is one of increasing importance, owing to the fact, as stated by Sir C. Ilbert, that "the increasing complexity of modern administration, and the increasing difficulty of passing complicated measures through the ordeal of Parliamentary discussion, have led to an increase in the practice of delegating legislative powers to executive authorities." This includes a great variety of statutory rules and orders and by-laws, both of Government Departments, local bodies and corporations; and their effect and relation to each other and to the statutes are very often very difficult to determine. The other important addition is Chapter IX of the same part, which treats on the "Legislation of

British Possessions." It is interesting to note there the decisions on the Commonwealth of Australia Constitution Act 1900, although these are not yet numerous, but no doubt Mr. Craies will have a much larger number to add to his next edition. The Appendix of words has been increased by adding recent decisions, and there has also been added a list of Colonial Interpretation Acts. We are not sure that Mr. Craies is correct when, in referring to the Channel Islands, he says, "neither the insertion of the clause," *i.e.*, a provision requiring registration in the Royal Courts, "nor the registration of the Act appear to be conditions precedent to taking effect in the islands if it is aptly worded." His reference to Jenkyns' *British Rule and Jurisdiction beyond Seas* does not support this, and on a later page he seems more doubtful on the point.

Ninth Edition. *Summary Jurisdiction Procedure.* By C. G. DOUGLAS. London: Butterworth & Co. 1907.

Everybody who is concerned in magisterial business knows the necessity of a good treatise on summary jurisdiction procedure, and the success of Mr. Douglas's work on that subject is shown by the fact of its having reached its ninth edition. In spite of considerable additions rendered necessary by recent legislation and decisions, the Author is able with modest pride to state that the bulk of the book has been reduced "by judicious compressions." The body of the work contains the Summary Jurisdiction Acts, and the Indictable Offences Acts, and in the Appendix are given a large number of other statutes relating to the same subjects. The statutes are fully annotated, and we have been struck by the amount of learning and ingenuity displayed in the notes. The ingenuity, if we may call it so, has been applied to the consideration and, as far as possible, the solution, of difficult questions on which there is as yet no authoritative decision. Great use has been made for this purpose of that valuable periodical the *Justice of the Peace*, and the reader will constantly find himself referred to its pages for a fuller discussion of the point under consideration. On some points the authority of the learned Editors of that publication is the only authority that the Author has been able to find, but on some other occasions it is fortified by that of the learned Editor of *Stone's Justices' Manual*. On one point, however, there is a terrible conflict of authority between Sir Harry Poland and the Editor of *Stone* on the one hand and the Home Secretary and the Editors of the *Justice of the Peace* on the

other, as to whether a previous conviction under 42 & 43 Vict., c. 49, would prevent the Court dealing summarily with a prisoner under sect. 14. What is an unfortunate magistrate to do in this case? We have particularly noticed a long and valuable note on the restitution of Stolen Property. It is curious to observe the difficulty that seems to have arisen where Courts of Quarter Session recommend the expulsion of aliens whom they have sentenced to imprisonment as incorrigible rogues. The Home Secretary, in a circular of October 1906, points out that the Court of Quarter Session in such a case has not power to give a certificate, and suggests that the Court of Summary Jurisdiction should get over the difficulty by dealing with such cases as "rogues and vagabonds." Another circular from the Home Secretary, of August 1906, should also be carefully noted. There are two or three doubtful points about bail also referred to.

Fourteenth Edition. *Tristram and Coote's Probate Practice.*

By T. H. TRISTRAM, K.C., D.C.L., W. F. L. DE QUETTEVILLE and B. H. H. THOMSON, assisted by GORDON SIMPSON. London: Butterworth & Co. 1906.

In reviewing a work of this nature, which by reason of intrinsic merit has acquired a well-established reputation, it is hard to say anything that has not already been said. When, in 1858, the late Mr. Coote brought out his work on "Common Form Practice," there was great scope for such a work owing to the abolition of the exclusive right of practice in the Ecclesiastical Courts, then in the hands of Proctors. Dr. Tristram wrote a book on "Contentious Practice" somewhere about the same date, a book which gained a solid reputation. When the second edition was brought out, it was felt that the two should be combined, a course which has ever since been adopted with great success. For many years Dr. Tristram was assisted by Mr. H. A. Jenner, a Principal Clerk in the Probate Registry. Owing, however, to the latter being appointed District Probate Registrar at Chester, it was necessary to find other collaborators. Mr. B. H. H. Thomson, Clerk to the Senior Probate Registrar, was therefore chosen to revise Part I, which deals with the Practice in Common Form of granting Probates and Administrations. Part II, which deals with the practice with regard to Caveats, Citations, Motions and Summons, has been entrusted to

Mr. W. F. L. de Quetteville, Senior Clerk in the Principal Probate Registry. To the practising barrister the most interesting is perhaps Part III, which deals with "Contentious Business." This, together with the Appendices, new Time Table and Table of Fees, has been revised and brought up to date by Mr. Gordon Simpson, Clerk in the Contentious Department of the Principal Probate Registry. It will therefore be seen that no effort has been spared to place the work in most efficient and capable hands. It may be at once said that each of these gentlemen has performed his several duties with erudition and diligence. The fact, too, that the general supervision still rests with Dr. Tristram is a sure guarantee that the high standard set in former editions will amply be maintained in the present one. Several new features have been introduced, notably in Part I, where Mr. Thomson has cited from old manuscripts and from notes in the Registry, decisions on important Points of Practice not heretofore reported. Also a new chapter containing a report of the laws as to the execution of wills in British Possessions abroad has been added. The new Time Table inserted in Part III is of the greatest possible assistance to the practitioner, and is very complete and comprehensive. The Index is very ample, simple and illuminating of the body of the work. In conclusion, it can only be said that the work is worthy of the Authors and the Authors of the work.

Eighteenth Edition. *Paterson's Licensing Acts.* By W. W. MACKENZIE, M.A. London: Butterworth & Co. 1907.

Hardly a Session of Parliament passes without some enactment which deals with liquor traffic in some form or other. To make matters worse there seems to be some fatality connected with this branch of legislation which produces startling decisions in the Courts, and absolute chaos in the minor Courts which have to deal with licensing itself. This was particularly exemplified in the case of the tribunal constituting the Compensation Authority inaugurated under the Licensing Act of 1904. The decision in *K. v. Leeds, J.J., ex parte Binns*, not only threw into confusion what had become settled opinion in the matter, but rendered invalid the decisions of the Compensation Authority in the majority of Boroughs, thereby necessitating the hasty passing of the Licensing Act 1906. All this together with many other decisions, has rendered the production of two editions of this work obligatory within the space of twelve months. One remembers *Paterson*, before it burst forth into a yellow

cover, being a fairly slight volume, and one views with bewilderment the present portly tome, wondering how it has come about in such a short space of time. When one thinks of the unsatisfactory condition of the question affecting the basis upon which compensation is to be computed, the problem presents itself as to whether soon two volumes will not be necessary. One of the most interesting points in the working of the Licensing Act of 1904 is the exercise of the power of extinction of licences under the machinery provided. In the year 1905, according to official records, eighty *on* licences were refused on grounds not entitling to compensation, and 514 extinguished with compensation. Inasmuch as the Licensing Authority has power to attach conditions to the granting of new licences for the purpose of securing the monopoly value, it is interesting to gather from official sources the various ways in which this dangerous weapon is wielded. Mr. Mackenzie gives copious extracts from blue-books dealing with these questions, which give a philosophical reader ample food for reflecting upon the danger of over-legislation. The learned Author's notes are always informing, and the arrangement of matter excellent, and it is quite easy to find quickly what is wanted, which, after all, is the acme of perfection in a text-book. It would seem as if the quality of the paper, and general "get up" of the work had been improved in this edition, but that may only be imagination. However that may be, Mr. Mackenzie is to be congratulated upon producing a work which has stood the test of time and experience without being found wanting. If one criticism might be made, it would be that many items in the Index are unnecessarily verbose, but that is a minor matter which can easily be rectified.

Twenty-seventh Edition. *Handy Book of Joint Stock Companies.* By F. GORE-BROWNE, M.A., K.C., and WILLIAM JORDAN. London: Jordan & Sons. 1907.

It is only two years since the last edition of this work was published, but there are good reasons for the issue of the one before us. Though there has been no fresh legislation on the subject, there has been a number of important decisions. Of these *Tasker & Sons, Limited*, and *Perth Electric Tramways* are on the illegality of the re-issue of Debentures; *Nash v. Calthorpe* and *Macleay v. Tait* are important decisions on section 38 of the Act of 1867, and decide that a plaintiff cannot succeed, although an important contract has been omitted, if the Court comes to the decision that he "would

not have been deterred from taking his shares by knowledge of its contracts." In *Shepherd v. Bray*, Warrington, J., considered at length the rights of Directors who had paid damage for loss arising out of misrepresentation in the prospectus, to recover contribution from co-Directors. *Hind v. Buenos Ayres Grand National Tramways* is an important decision on the question as to what may be charged*to capital account. A very important addition is the new Table A, which has been at last adopted by the Board of Trade, and which, as Mr. Gore-Browne says, brings the "regulations for the management of Companies registered without special Articles of Association into accord with modern practice." This is given in Appendix C., with full notes and comments, and the book in every way keeps up its well-earned reputation as a handy book on Company law and practice.

Thirty-Ninth Edition. *Stone's Justices' Manual.* By J. R. ROBERTS. London: Butterworth & Co. 1907.

Twenty-two of the Acts passed in 1906 are noted in this edition. Though perhaps none of them can be said to be of first-rate importance, yet some of them will no doubt give a certain amount of work to the magistrates. Attention will have to be directed to the Dogs Act, which, as Mr. Roberts says, entails "especially upon clerks in country districts, much additional work without compensating fees"; the Prevention of Corruption Act; and the Street Betting Act. This last is likely, we think, to lead to a number of proceedings, particularly if "backers" are prosecuted as well as "bookmakers." It may also be difficult to decide what is ground "adjacent" to a race-course. Two statutes creating new offences are not considered—the Merchant Shipping Act, on account of the late period of the Autumn Session at which it was passed; and the Census of Production Act, because it does not come into operation till next year. It is interesting to note that the Licensing Act 1906 had to be passed to amend the Act of 1904 and to remove the deadlock resulting from the decision in *R. v. Leeds JJ., ex parte Binns*. The most important of the 150 or so new cases cited are connected with the Licensing Acts, and *In re Ashby's Cobham Brewery Co.* is very important, though Mr. Roberts is not quite satisfied with the decision, and hopes that the Government's forthcoming Licensing Bill will do much "to simplify the present anomalous and chaotic condition of the Licensing Laws."

Foibles of the Bench. By H. S. WILCOX. Chicago: The Legal Literature Co. 1906.—This amusing little work will be read with great interest by members of the legal profession in England. Mr. Wilcox takes several qualities which should not be possessed by members of the Bench, and gives a short story of a hypothetical judge endowed in an abnormal degree with each of these foibles. Perhaps the best little sketch is the one of "Judge Wind," who illustrates the drawback of possessing the quality of vain display to excess. Finally, the picture of an ideal Judge is drawn, but it would seem as if no person has yet been born who answers to the description. The book is written in racy, witty language, some of the American idioms giving great point to a statement. Perhaps the following epigram enunciated by "Judge Justinian B. Fair" is a gem amongst many gems: "A late Bench makes a laggard Bar."

The Law and Practice of Interpleader. By S. P. J. MERLIN. London: Butterworth & Co. 1907.—Dedicating his work to Mr. S. T. Evans, K.C., M.P., the Author has attempted "to bring within the compass of one volume all the law now in force relating to Interpleader in the High Court and County Court." This reads somewhat like an assumption that such an effort has not been made before, whereas excellent books on Interpleader by Mr. Cababé and Mr. MacLennan already exist. Mr. Merlin's book, however, appears a useful one. In an interesting Introduction he deals with the history of Interpleader or "Enterpleader." The work is divided into three parts: (1) Interpleader in High Court; (2) Interpleader in the County Courts; (3) The Conduct of an Interpleader Proceeding. This last will, no doubt, be found especially useful, as it deals with Interpleader by various classes of people, such as Stakeholders, Sheriffs, Execution Creditors, etc. Appendices of Forms and Rules, and an Index of Cases giving full references, make the book a complete and handy one.

Commercial Law. By A. NIXON and R. W. HOLLAND. London: Longmans, Green & Co. 1907.—The title of this book is somewhat grandiloquent; and the Preface is perhaps a little lacking in modesty. The Authors say that their work is written "mainly for the student preparing for the various professional and commercial examinations." If in this class are included law students, we think that they should have quoted more frequently from the Reports, and that a Table of Cases might have been included. As an elementary outline, however, of the Commercial law, it will doubtless serve its purpose. There are four Parts dealing severally with—(I) Commercial Transactions (Contracts, Capacity to Contract, etc.); (II) The Law of Persons (Partnerships, Companies, Principal and Agent); (III) Mercantile Property (Negotiable Instruments, Insurance Policies, etc.); (IV) Various Matters, such as Bankruptcy, Executorship and Arbitration. There is a list of legal maxims. At the end of each chapter are test questions, which are always a useful feature in books of this kind.

The Law relating to Covenants running with Land. By R. CUTHBERT BROWN, M.A. London: Sweet & Maxwell. 1907.—A glance at Mr. Brown's book will be enough to show that this subject is of ever-growing importance, and can no longer be considered as bound up in the rules of *Spencer's Case*. That remains the leading authority upon the subject; but a crowd of refinements and

distinctions has since been made, quite sufficient to justify the hundred and eighty-seven pages of this book. The Introduction is also of value. The nature of a covenant is there clearly set forth, and the various species of covenants defined. Various modern developments of the law, such as that which obtains in the case of land sold in lots, are clearly explained. We think that the whole is a useful addition to the library.

The Principles of the Indian Criminal Law. By E. R. WATSON, LL.B. London: Sweet & Maxwell. 1907.—The Author, who has been a Lecturer to the Council of Legal Education, Colombo, has designed this book for the use of Indian Bar and Civil Service students. The leading works on the subject, he contends in the Preface, either are too voluminous or are too much manuals of practice. His object, he says, has been to get at the true meaning of the cardinal sections of the Penal Code, defining those *mala in se* which every system of law recognises as criminal. The book is divided into lectures, and deals in turn with the Criminal States of Mind, Exceptions to Liability, Abetment, and the various offences. We prefer as a rule to see references to the Reports given in a Table of Cases. Mr. Watson has not done this, but he may, perhaps, be held excused on the ground that this is merely an elementary treatise. We think that the book will fulfil its purpose.

The Yearly Digest of Reported Cases 1906. By G. R. HILL, M.A. London: Butterworth & Co. 1907.—The new volume of this Digest will be found as useful as formerly. Saving that the Tables of Cases Over-ruled, etc., and of Statutes and Orders referred to, have been transferred to the end of the book, the plan is the same as before. Containing as it does all the reported cases decided in the English Courts up to the 31st December, 1906, with a large collection of Scotch and Irish cases, it is an excellent book of reference. Among the important decisions within its compass may be mentioned *R. v. West Riding County Council*; *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association and others*; *Marchioness of Huntly and another v. Gaskell and others*.

Paterson's Practical Statutes 1906. By J. SUTHERLAND COTTON. London: Horace Cox. 1907.—Fifty-eight Acts of Parliament were passed during the 1906 Session. Of these the best known were the Prevention of Corruption Act, the Merchant Shipping Act, the Trades Disputes Act, the Public Trustee Act, the Agricultural Holdings Act, the Education (Provision of Meals) Act, and the Workmen's Compensation Act. Besides these, however, were several of considerable importance, such as the Dogs Act, the Street Betting Act (which makes the practice of street betting a criminal offence), the Colonial Marriages (Deceased Wife's Sister) Act, and the Musical Copyright Act (which the Editor describes as a further and much more vigorous effort to protect musical copyright than was made by 2 Edw. VII, c. 15). All these, and most of the others, are set out in full in the present edition with, in the case of the more important statutes, an introduction explaining the causes for and the nature of each. There is an admirable series of tables giving the titles of the statutes, the principal enactments repealed, and the subjects altered. This is an invaluable work of reference.

Second Edition. *Registration of Voters.* By M. MOLONEY. London: Sweet & Maxwell. 1907.—This little work is intended to be a handbook for the use of Overseers, Assistant Overseers, Vestry Clerks, Town Clerks, Registration Officers, Rate Collectors, and all persons connected with the registration of electors. There is no doubt whatever that it quite fulfils that object. The Author, if we mistake not, a well-known Revising Barrister, brings to bear on the subject a ripe and extensive practical experience. Since the issue of the first edition in 1903, the now famous "Latch-Key" decision has been delivered, and the present edition is chiefly intended to deal with the revolution this judgment caused in registration matters. Mr. Moloney points out most lucidly all the points of law affected, and his directions as to the steps that should be taken, and the inquiries that should be made in dealing with the claims of "Latch-Key" voters, are most useful and instructive. In many other respects the body of the book and notes have been carefully revised and amplified. In conclusion, we can only say that the book, written as it is by a practical expert, will quite occupy the position of "guide, philosopher and friend" to that large community, mostly laymen, for which it is avowedly intended.

Second Edition. *Land Revenue in India.* By B. H. BADEN-POWELL, C.I.E., revised by T. W. HOLDERNESS, C.S.I. Oxford: The Clarendon Press. 1907.—There must be many concerned in the government of our Indian Empire to whom this book, written by one of a distinguished family, will be acceptable. "To understand the Land Revenue system is to gain a greater knowledge of Indian government than could be acquired in any other way," says Mr. Baden-Powell in his Introduction. The subject is ably dealt with. The book is divided into two parts: the first treats of the Features of the Country, etc., affecting the Land Revenue, Administration, of the Organisation of Districts, the Nature of the Land Revenue and of the lands liable to pay it. The second is devoted to Land Tenures and the Land Revenue Systems. There is a full Index, and an admirable coloured map of India showing the areas under the different kinds of Land Revenue Settlements.

Fourth Edition. *The Law of Meetings.* By G. A. BLACKWELL, LL.B. London: Butterworth & Co. 1907.—*Sharp v. Dawes* (2 Q. B. D. 26), decided in effect that "it takes two to make a meeting." Inasmuch as the same number proverbially admits of a quarrel, litigation may arise out of meeting. At all events, a text-book on the subject must be of value to many. As the Author says in his Preface, he deals with meetings of two classes, (1) those convened by persons under no legal duty to hold them, for social, political and other purposes; (2) those convened by corporate bodies under a legal duty to hold them. Wide range though this is, we think that the Author has covered it thoroughly. The legal position of persons attending political, etc., meetings, the application of the law of slander to such meetings, general rules for meetings, "amendments," "previous question," "closure," the statutory rules for meetings of County Councils, Borough Councils, Boards of Guardians and Companies—all these matters are adequately treated. The cases germane to the subject are collected. There is a good Table of Cases, and the book is well produced.

Ninth Edition. *Willis's Workmen's Compensation Acts: The Workmen's Compensation Act 1906.* By W. ADDINGTON WILLIS. London: Butterworth & Co. 1907.—Judging from the correspondence which has already taken place in the Press, the Workmen's Compensation Act of 1906 is likely to afford the law as much work as its predecessor of 1897. The Act comes into operation on the 1st July, and Mr. Willis's new edition therefore appears at a timely juncture. In an interesting Introduction the Author points out the steps by which the present legislation has been attained from the old Common law Right of Action against a master who had personally failed in taking reasonable precautions to ensure his servant's safety, to the 1906 Act which will bring an additional six million workers within its privileges. The new Act extends the word "workmen" to include all employes except those earning more than £250 per annum, casual employes, policemen, outworkers, and members of an employer's family dwelling in his house. Other important alterations are the practical removal of the "wilful misconduct" defence, and of the "time limit bar." The Act is set out in sections, each section being thoroughly explained and illustrated by the Author, together with all the cases bearing upon it. In the course of the book he anticipates certain nice questions of law, *e.g.*, the meaning of the expression "whose remuneration exceeds £250 a year." He points out that the basis of the definition of "workman" is a "contract of service," and that the word "remuneration" is apparently confined to aggregate payments from one or more employments. The question may affect medical practitioners, surveyors, etc., who are paid small salaries by public institutions and also allowed to practise privately. Mr. Willis is somewhat reserved as to the interpretation of "casual" employes, but thinks that the exception is meant to exclude the "odd" gardener and window cleaner. The book has an excellent Table of Cases and Index, and is of a handy size, though we should imagine the next edition will necessarily be more bulky. We can cordially recommend the book.

Forty-fourth Edition. *Every Man's Own Lawyer.* By a Barrister. London: Crosby Lockwood & Son. 1907.—As this work has reached the forty-fourth edition, it is evident that there are many people who do not believe in the old adage that "A man who is his own lawyer has a fool for a client." That there are many people who prefer to do their own law, is lucky for the legal profession. However that may be, one must in justice say, that for a work of its class the present one is remarkably well done. The language employed is simple and to the point; any redundancy of legal phraseology is carefully avoided, so that the most inexperienced of laymen is in a position to comprehend what is written therein. The field from which this work is garnered is a very wide one, what the crop may be, is open to great speculation. The new Dictionary of legal terms is very good, and the Index is a very efficient key to the general contents. It is the duty of a reviewer of legal works to point out the good or bad quality of the contents of a book, and not to give vent to an opinion as to the practical utility of the volume itself. Regarded from that standpoint, one is bound to say that the learned author has expended much research and acumen on the matters in hand, and has presented the result in a legal tabloid form, which may or may not benefit the class of reader for which the work is primarily intended.

FOREIGN PERIODICALS.

Zeitschrift für Internationales Privat-und Öffentliches Recht. Leipzig: 1906.—How the Alien Act 1905 strikes a German jurist is the subject of an article by Herr Wittmaack. He thinks that thus far the country has not reaped much advantage from it. The nation, says he, at one time regarded it with suspicion, especially as in some directions it had been too rigorously enforced. But the operation of the Act is now placed on a more satisfactory basis, provision being made for political refugees and for individual cases of hardship. At p. 648 is a review of Mr. Westlake's *Private International Law*, interesting from the attack made on its "insular" character, the reviewer suggesting that there ought to be added to the title, "with principal reference to its practice in England."

Deutsche Juristen-Zeitung. 1 Jan.—15 March. Berlin.—The article by Dr. Reichel on *Bordellhypothek* (p. 109) deals with questions of law which would be impossible in England. The discussion on p. 122 as to what is an *öffentliche Platz* will remind the English reader of a point much discussed a few years ago. The programme of the international course of juristic psychology and psychiatry, to be held at Giessen in April, offers some points of interest. Some of the subjects of discussion are these:—Epilepsy as a cause of crime; determinism and punishment; the psychological moment in civil and criminal process; psychology of evidence. At p. 369 two giants meet, Heinrich Brunner's *Deutsche Rechtsgeschichte* is reviewed by Otto Gierke.

La Giustizia Penale. 4 Jan.—22 March. Rome.—Several decisions of more or less interest may be noted. It is injurious but not defamatory to allege of a priest that he is *ministro di Bacco, tabacco, e Venere* (p. 152). The strictness required in administering the exact words of the oath—of which examples have been given in previous numbers of this magazine—is again illustrated by a decision that the evidence of an expert witness is a nullity where the word *pura* is omitted before *verità* (p. 325). A cabinet-maker undertook to make a piece of furniture with wood of a certain quality, and sufficient money was given him to purchase the wood. He used wood of an inferior quality and pocketed the difference. He was held guilty of commercial fraud (p. 383). It is no defence to a prosecution for brawling in church that the preacher transcends the bounds of religion and enters on the field of politics (p. 428).

JAMES WILLIAMS.

WORK OF REFERENCE.

Debrett's House of Commons and the Judicial Bench. 1907. London: Dean & Sons.—When a book has reached its forty-first edition it is evident that its usefulness has been made amply manifest to the class to which it appeals. *Debrett* is too well known to need any detailed treatment at our hands, and it will be sufficient, perhaps, to say that in the present issue the usual high standard of completeness and accuracy of former editions is fully maintained. All the necessary additions and corrections appear to have been noted in both sections, and the work shows a degree of careful revision which renders it a most reliable book of reference.

Books received, reviews of which have been held over owing to pressure on space:—Mew's *Annual Digest 1906*; Maude and Leach's *Contracts of Local Authorities*; Morrow's *Building Cases*; Hudson's *Building Contracts*; Webster's *Conditions of Sale*; Pierce's *The Tariff and the Trusts*; de Hart and Simey's *Marine Insurance Act 1906*; Caleb's *De la Responsabilité des Administrateurs*; Bund's *Game Farms and Game Laws*; Kelke's *Constitutional Law and Cases*; *Encyclopædia of Forms and Precedents*, Vol. 13; Eustace's *Practical Hints on Pleading*; Knowles' *Law relating to Workmen's Compensation*; J. & J. C. Adam's *Criminal Investigation*; Phipson's *Law of Evidence*; Heywood and Massey's *Lunacy Practice*.

Other publications received:—*Blacklisting and Boycotting.* By G. Hæbner; *Municipal Gas Lighting.* By E. S. Bradford (Wisconsin Free Library Commission); *Report of the American Bar Association*, Vol. XXIX (Dando Printing and Publishing Co.); *The Humane Renew*; *The Question of Criminal Appeal* (Humanitarian League); Morgan's *Public Trustee Act 1906* (Stevens & Haynes).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

THE LAW MAGAZINE AND REVIEW.

No. CCCXLV.—AUGUST, 1907.

I.—CENTRALIZATION OF FEDERAL POWER.

ONE of the momentous questions that to-day agitates the American public is the centralization of Federal power, and the interference by the national government with State rights or the local and domestic rights enjoyed by the several independent States. The intricate and purely abnormal fabric of the national system of government of the United States is imperfectly understood abroad. In foreign countries the State at large—the national power—is present and constantly in touch with the citizen and private individual, while in the United States the greater portion of the 80,000,000 inhabitants rarely if ever come into contact with the Federal government, and then only on the strictly personal and commercial transaction of buying a postage stamp. The ordinary citizen has nothing whatever to do with the national government; he never comes into touch with its officers; does not render military service to it; does not pay his taxes to it; does not serve it in any way and does not seek its aid or protection. From birth unto death he follows his way independent of the country of his nationality—of the Federal government of the United States. His laws are the laws of the State—of his birth-place usually—of his habitation or domicil, and these are

local. They are the laws of the State or Commonwealth of which he is a citizen or a subject.

Among the forty-seven States of the Union covering various climates and absolutely different physical aspects, States that have sprung from opposite conditions and races, it is but natural that diverse laws should prevail.

Originally the shores of the North American continent were thronged by masses of colonists coming from countries of antagonistic jurisprudences representing every stage of civilization, and the revolt of the colonies rested on the principle that an independent territory should have an independent nationality; but our conception of nationality is a union of States with diverse jurisprudences. Origin, social habits, climate and environment fix and determine the domestic conditions and life of a people. Thus, when the thirteen original States came together, each was zealous to preserve and secure to itself its own laws, and the several States indignantly repelled any attempt at national interference with their police powers and domestic laws, and expressly insisted that they only ceded to the national government such rights and privileges as were specifically enumerated in the Federal Constitution,—laws of inheritance, of marriage, of divorce; in fact, all the domestic relations were and are left to the control and regulation of the several States, and with these the national power has no right to interfere. In time of peace, and so far as concerns their internal administration, the several States are in fact and in law sovereign.

If the liberty of the American citizen is great the liberty of the several independent States is greater, and this liberty—this freedom from all interference and control in the regulation and administration of its internal laws—is regarded with intense jealousy. The different States will permit no outside interference in their local and domestic affairs. No one is compelled to dwell within its territory,

but those who do, do so as willing and loyal subjects or citizens (as the case may be), and cheerfully aid in carrying out the laws which the sovereign people of the State make for their own guidance.

When, therefore, the President of the United States agitates the question of a national law of marriage and divorce—of abolishing the long-established local customs and laws of the various States, and centralizing them under national dominion—he is treading on dangerous ground; he is awakening the spirit of local protection and individual rights and authority retained by the domestic power—he is in a word interfering with State rights. There may be conditions that might be justly improved in the domestic relations of some of the States, and from this fact some remedial legislation is insisted upon, but after all is this not a matter best left to the judgment and control of the people themselves, who live under the laws which they themselves provide, rather than to be transferred to an indifferent national authority which knows no locality, no climate, nothing local? The several States within their own territory are to-day supreme in matters of marriage and divorce. No law of Congress could affect these matters except within United States territory, such as the District of Columbia and territories where the Federal law alone applies. To carry out any general and universal system of marriage and divorce it will be necessary to obtain an amendment to the United States Constitution, an amendment which can only come in force after being ratified by the legislatures or conventions of three-fourths of the several States. The danger of such an amendment lies in the abdication of one of a State's greatest prerogatives—in ceding its inherent right to regulate and rule its local and domestic relations which, once abandoned, can never be regained.

In his last Message to Congress the President of the United States said: "In my judgment, the whole question

of marriage and divorce should be relegated to the authority of the National Congress."

In connection with this recommendation the President referred to the wide differences between the laws of the different States on this subject which result in scandal and abuse.

In close connection with this recommendation the President in particular mentioned the importance of conferring on Congress power to deal radically and efficiently with the question of polygamy, and in language that no head of an ecclesiastical, or temporal power has ever dared to assume to a governing body, he anathematized every man or woman who may be chargeable with wilful sterility as unworthy of self-respect—as guilty "of a sin for which there is no atonement."

Polygamy and wilful sterility may very well be national evils—if not sins—but it is questionable whether the wide difference between the laws of the different States on marriage and divorce are such as require national or imperial legislation, or such as would justify the several States in once and for ever forfeiting and relinquishing their exclusive jurisdiction over these purely local and social questions.

"There are regions in our land," says the President, and "classes of our population where the birth rate has sunk below the death rate," but it will not do to take one line of statistics alone and argue from them certain conclusions. These can only be based on an intelligent consideration of the whole great question of social and national growth, which is a life's study in itself. The Registrar-General for England, in his recent report for 1906, goes thoroughly into this very question, and points out that "a high birth rate does not necessarily involve a larger effective addition to the population than does an average or even a low birth rate. In too many cases high birth rates are associated with excessive sickness and mortality during

“ the first few years of life, the result being that not only do
“ fewer than a normal proportion of the children survive at
“ the age of five years, but those who do survive at that age
“ have fallen below the normal standard of physical fitness.”

To pass the constitutional amendment which the President asks—to cede to the Federal government the exclusive control and supremacy of the most sacred relations in life, would be to abandon once and for all the rights of the States to supervise these domestic questions of local and internal policy.

An evil may be great, but we should well deliberate before creating a greater evil in order to overcome the lesser, for the relinquishment by the States of their control over marriage and divorce might lead to more serious consequences than even the present scandals, which the President mentions, arising from the conflict or laxity of State laws. The danger of a constitutional amendment is the danger of undermining the foundation of our federated system. National spirit, national patriotism, national concentration, national unity, are all very well and proper, and may lead to national greatness, but if the concentration of power was freely conceded on demand, if the States were to unhesitatingly accede to the requests made upon them for the relinquishment of their social privileges and rights, there would soon be on the North American continent but one State and one government—the Federal government of the United States.

In treating the subjects of marriage and divorce we have to do with purely economical and sociological questions and with matters which are not distinctly Federal; and it is difficult to see how the question of marriage and divorce which the States have so sedulously guarded under their own peculiar conditions of race, climate and tradition, have suddenly become National and Federal, have loomed up in importance beyond other questions of internal and local

policy, and require the complacent submission of the States to the imperial demand of the Federal power. If the States forfeit this right and abandon their supremacy to regulate each for itself this vital question of marriage and divorce, it would be but the beginning of the gradual but sure concentration of Federal supremacy which may eventually overthrow statehood, and cast into the hands of one administration the destiny of our federated country.

Every law that has to do with education, sanitation, food, drink, housing, social questions and sexual relations, has to do directly with the home and is local—they are the rules of guidance and control of the family and the household, and not proper subjects for Federal legislation.

There is no question but that by present International law a sovereign State has power to divorce its domiciled subjects, and throughout the United States subjects are the domiciled citizens of the State.

It is also a rule of international jurisprudence that a foreign law will not be admitted for the purpose of overriding any rule of distinctive domestic policy.

Why, therefore, should the sovereign States be asked—yes, even intimidated—into relinquishing their right to establish, regulate and control their own domestic policy affecting marriage and divorce? There may be evils that suggest more effective and prudent control, but not a control by a foreign power, for the Federal government of the United States is a foreign and frequently even a hostile power towards the independent States. Another great danger of Federal legislation on this subject lies in the tendency towards national aggrandisement—towards centralization—towards the grip that crushes and exhausts free and individual thought and action. The pressure of modern times is toward over-legislation. We have too many laws. Our land is becoming over-burdened with the law-maker, who annually floods the land with laws, not only from the

National Congress, but from forty-seven separate State legislatures. This greed for legislation has extended to a greed for increased national power, for centralization, for embracing within the grip of Federal control the most cherished rights retained by the States. In this there is danger, not from any one particular act, but from admitting the principle that the several States should abdicate their statehood and become slaves to the Federal power on every pretext or demand. By acquiescing in the proposed constitutional amendment giving the Federal government power to legislate on questions of such a purely local and domestic nature as marriage and divorce, the States will abandon one of their most sacred rights, and mark with their approval a policy which may eventually lead to the complete extinguishment of the States themselves.

If we are to seek remedies wherever evils exist we would soon be overwhelmed with projects of new legislation and constitutional amendments innumerable. Take for illustration the law taxing successions, or the inheritance tax, as practically worked out, and we have the iniquitous principle of having frequently to pay a burdensome tax several times over. No one will admit the justice or equity of such a system, and yet it is a subject that interests and affects the American citizen just as keenly as does the question of marriage and divorce. The Supreme Court of the United States recently said: "No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted also that one and the same State should be seen taking on the one hand according to the fact of power, and on the other at the same time according to the fiction that in successions after death *Mobilia sequuntur personam* and domicil governs the whole."

If we are to correct every instance of injustice then why not insist also on a Constitutional amendment relegating

all taxation to the Federal power, and release the States from the burdens of enforcing such unpopular laws?

The Articles of Confederation of the United States of America agreed by Congress, November 15th, 1777, and subsequently ratified by the thirteen original States, provides that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States in Congress assembled; while the Constitution itself provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the other, and each has citizens of its own who owe it allegiance, and whose rights within its jurisdiction it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State,¹ he may be a citizen of a State and not a citizen of the United States,² and he may be a citizen of the United States without being a citizen of a State, as in the case of inhabitants within the District of Columbia and the several territories.

Human ingenuity seldom devised such a grand homogeneous system of political science as that on which the fabric of the Confederate States of the American Union is based. The secret of its power and success lies in the control which the Federal government has over the States on the one hand, and which the States exercise over the Federal government on the other. It is this restraint—this curb and check—which keeps the two systems moving in harmonious but perfect unity. The constitutional limitations on the States holds those separate governments

¹ 16 *Wallace*, 74.

² 19 *How*, 393.

within the strong hand of a national control, while the rights of local self-government reserved to the States prevents the Federal power from arbitrarily over-reaching and submerging the sovereignty and independence of the States. Take away the constitutional restraint over the States and they would soon become independent and belligerent Powers striving and struggling one against the other; and if you take away the rights of local and domestic sovereignty reserved to the States, then the Federal government would soon bloom into an imperial Power absorbing all local self-government and extinguishing the individuality of the States. It is for this reason that every infringement by constitutional amendment or otherwise, every breaking in upon and lessening of a State's control over its own citizens, tends towards the extinguishment of local self-government and the realisation of that Federal power, which gradually absorbing little by little, may eventually result into political disintegration of the several States.¹

As Chief Justice Chase well said, the political system of the United States is that of an indestructible union of indestructible States; and if after the civil war the Union emerged consolidated and indestructible the individual States were again re-organized as indestructible. The strength of the States has always been in their delegated powers to the Federal government and in reserving to themselves all power and authority not expressly ceded. The principle *expressio unus est exclusio alterius* pervades our entire system, and found expression in the expressed constitutional provision that all rights not expressly granted to the Federal government are reserved to the States.

For this reason there are as many jurisprudences as there are States, and the submission of the entire population to Federal authority in matters of local and domestic interest—to laws regulating domestic relations—would be the destruction of our State governments.

¹ *Wharton*, sect. 8.

It was Wharton's opinion that no jurisprudence could be constructed which would be equally adapted to all sections of a territory so vast and so populated by a people with such diverse traditions and diverse customary laws as those found in the United States.

A State, in the ordinary sense of the Federal Constitution, is a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written Constitution and established by the consent of the governed.

It is the prerogative of the sovereignty of every country to define the condition of its members, not only its resident inhabitants but others temporarily there, as to capacity and incapacity.

The Italian writers lay down a distinction between what is called necessary and voluntary laws. Necessary law is that which governs the personal state, order and relations of the family, and these conditions cannot be voluntarily altered.

National climate and capacity, soil for cultivation, national traditions as to manner, have much to do with the precocity of moral and physical development, with family organisation and methods of business; and personal and family relations constitute an *ensemble* of attributes which do not belong to every human being, but to individuals constituting a specific nationality.

Each State has the right of regulating the status and condition of its subjects and making personal laws affecting the privilege and capacity of its inhabitants, for it is the best acquainted with the circumstances of climate, race, character, manners, customs, and traditions of its own people.

National legislation, on the subject of the domestic relations, will result in the introduction of a centralization of jurisprudence inconsistent with liberty and good govern-

ment, and with the fundamental principles on which the United States became such, in fact as well as in name.

The line between Federal and State jurisprudence is clearly outlined. Let it be said to the credit of the Federal Courts and the Courts of the different States that they have conscientiously protected the slightest infringement of their respective constitutional rights, and have restrained the slightest attempt to improperly extend their jurisdiction beyond constitutional limits.

The limit of the full control which the State has in the proceedings of its Courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.¹

A right claimed under the Federal Constitution, finally adjudicated in the Federal Courts, can never be taken away or impaired by State decisions. The same reasoning which permits to the States the right of final adjudication upon purely State questions, requires no less respect for the final decisions of the Federal Courts of questions of national authority and jurisdiction.² Whatever deference may be due to the decisions of the State Court of final resort in every case in which it has spoken, and whatever may be the respect to which its decisions upon questions of purely local law established as rules of conduct or of property may be entitled, they are not authority binding upon the Courts of the United States sitting even in the same State where the questions involved and decided relate to rights arising under the constitution and laws of the United States.³

The several States are not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the Common law, and may avail themselves of the wisdom gathered by the experience of the

¹ 24 *Supreme Ct. Reporter*, 652.

² *Ibid.*, p. 160.

³ 120 *U. S.*, 141.

century to make such changes as may be necessary. For instance, while at the Common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information.¹

Each State has its own distinctive law of legitimacy, of marriage, of divorce, of succession, of guardianship, whether for infants, lunatics or spendthrifts: each State in matters within its orbit is supreme, so far as concerns foreign States, in respect to judgments rendered by its Courts. Each State is supreme in its control over business transactions within its borders, provided by its legislation it does not impair the obligation of contracts.² Each State has its own homestead law. Each State has the sole right to prescribe by law what property should be exempt from execution. Domicil, and not nationality, is the test that has to be applied in the United States in arriving at the status of a citizen, and in order to get at that status one has to seek the particular State where the citizen is domiciled. Our end has been to make and mould a nation springing from different races, from differences of soil, of climate, of traditions, and of language. Nationality in the United States relates to political status, while a man's civic status is determined by the place where he lives, by the law of his adoption, by his State, by the community of which he is a member and a part, by his fireside, his surroundings, his home.³

The Supreme Court of the United States has decided that the separate States are foreign to each other, except so far as united for national purposes under the Constitution.

The States possess, because they have never surrendered, the power to prescribe such regulations as may be reasonably necessary and appropriate for the protection of the

¹ 175 U. S., 175.

² Wharton, sect. 8.

³ *Ibid.*

public health and comfort.¹ They have the power of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public;² they can adopt any system of laws or judicature they see fit for all or any part of their territory.³

The States have the right to make political subdivisions of their territory for municipal purposes, and to regulate their local government. As respects the administration of justice, States may establish one system of Courts for cities and another for rural districts; one system for one portion of its territory and another system for another portion.⁴ If the State of New York, for example, should see fit to adopt the Civil law and its methods of procedure for New York City and the surrounding counties, and the Common law and its methods of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so.

States have the right to administer their own affairs through their legislative, executive and judicial departments, in their own manner and through their own agencies.⁵ The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government.⁶

The people deemed it best to institute the general government and confer on it the exercise of such public authority as was required to provide for the common defence, security, and welfare of the people as a nation, and to commit the exercise of the residue of their authority, so far as the same was necessary for domestic purposes, to the local administration of the States.⁷

¹ 26 *Supreme Ct. Reporter*, 103.

² 123 *U. S.*, 664.

³ 26 *Supreme Ct. Reporter*, 109.

⁴ 101 *U. S.*, 22, 31.

⁵ 17 *Wallace*, 322.

⁶ 26 *Supreme Ct. Reporter*, 114,

⁷ *Lieber*, sect. 300.

All matters of internal administration as pertain to the local and domestic interests of the people were left to the State governments.¹

Self-government has acquired for us chiefly or exclusively a domestic meaning facing the relations in which the individual and home institutions stand to the States which comprehend them.²

The general and State governments, as institutions of the people intrusted with the exercise of governmental authority, have jurisdiction over the same persons and territory, each possessing powers in exclusion of the other in matters committed to their respective jurisdictions. In the institution and endowment of these governments it is the intention that the general government shall administer in respect to the needs and interests of a national character, and the State government in respect of those of a local and domestic character.

Matters of ordinary Private law, that which affects the every-day relations of life, as well as administrative law, changing of names, adoption, the coming of age, corporations, partnerships, divorce, marriage, inheritance, privileges, exemptions, individual rights, rate of interest, municipal government, liens, and civil and criminal procedure, are matters that can vastly better be regulated by the community itself and controlled by the people who enact the law.³

As Lieber says, centralism, and the desire to bring everything under the influence of the Federal government, or to effect as far as possible everything by the national government has largely increased. This is illustrated in Paris, where one cannot be buried except by a chartered company under the strictest surveillance of the police. Centralized governments can effect certain brilliant acts, but they are on this account seriously liable to fall into a method of carrying

¹ Lieber, sect. 300.

² *Ibid.*, note, p. 39.

³ *Civil Liberty*, Lieber, 21.

on public affairs which in the language of stage managers is significantly called "starring," and which has the serious inconvenience of leading popular attention from solid actions to that which dazzles, from wholesome reality to mere brilliant ideas.¹

The very protest of the thirteen original States against the King of Great Britain in the Declaration of Independence, included his having "combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws"; for "abolishing our most valuable laws" and "altering fundamentally the forms of our government."

It would be a remarkable event, but one quite within the trend of modern centralism, to see all or some of the several States of our present union uniting in a similar declaration of protest and independence against the centralization of Federal power.

The declaration of independence was the outcome of a long period of oppression and "the establishment of an absolute tyranny over these States." Let the States have a care that the same tyranny the down-trodden colonies sought to escape in 1776 does not again rise over the American continent hidden behind the Congressional chair.

C. A. HERESHOFF BARTLETT.

II.—ECCLESIASTICAL INFLUENCES.

EVEN the moderately close student of our laws must have noted that the monastic or religious life of mediæval times has materially assisted in moulding our juridical system into the form we find it in to-day, and we would in the following paper draw the reader's attention to some of the more remarkable innovations, or attempted

¹ *Civil Liberty*, Lieber, 396.

innovations, which the inmates of the religious houses at various epochs have made, or attempted to make, upon our ancient Common law. That the clergy have on some occasions engrafted into this law doctrines culled by them from the laws dear to them—the Civil and Canon—is well known, and they have been the means, while furthering their own interests (which, by the way, they were ever alive to), of incidentally bringing into being great principles of law. For example; the establishment and regulation of Common Recoveries and the whole doctrine of Uses must undoubtedly be attributed to their genius alone.

We do not, however, intend to specify every occasion when a principle of the Civil law was implanted into our Municipal law and its precise effect; this would be of little service and would necessarily lead to a very extensive treatise under this heading. We wish mainly to draw the reader's attention to a matter which he may already have noted in some degree, viz., the continual struggle through many centuries between the barons on the one hand and the ecclesiastical fraternity (imbued with the scholasticism of the age) on the other, with respect to the laws of which they were the respective champions, and the effect of this warfare upon our system.

The clergy appear to have been ever ready to admix or even supersede the ancient Common law with doctrines culled from the municipal or pontifical laws of Rome; attempting, as we have said, to engraft upon our system of custom and usage, sprigs from these laws. The barons and laity, on the other hand, would seem to have been equally zealous to prevent all such innovations, the object of the latter apparently being to hand down to posterity the legal principles of our Saxon ancestors unmixed by any such ingredients.

We see this on many occasions after the Conquest, and instances will be cited later to prove the truth of our

assertion, and, in spite of all the endeavours of the laity to the contrary, a great part of the Roman Civil law was secretly transferred into the practice of our Courts of justice.¹

Of course it was quite natural that the clergy should adhere to that system of law in which they had full faith and knowledge, a law that was adapted to their genius, rather than to one in a foreign tongue and with which they were not conversant, neither were the doctrines agreeable to their ideas of what a Municipal law should be. We are inclined to impute the condition of things which prevailed soon after the reign of William I, and which led to the Norman princes on many occasions promising a restoration of the laws of Edward the Confessor, to the excessive desire of the Norman clergy to foist the Civil and Canon laws on the people at that era, when in those days, groaning under the new yoke, our ancestors were frequently promised a restoration of these laws (the foundation, it is said, of our Common law) as the most popular act a king could do.

It is well known that our ancient Common law was at one period in imminent danger of total extinction by the Civil or Municipal law of Rome being so closely read and studied by the popish clergy, and it was only the opportune fixing of the Court of Common Pleas "in some certain place" that averted this disaster. However, it is said by Professor Maitland that it was Bracton who saved our Common law from the fate that awaited German law in Germany—and Coke's head was full of Bracton.

The famous Statute of Merton was an Act passed to prevent an innovation in our Common law. The famous saying, "*Nolumus leges Angliæ mutari*" dates from the Council of Merton, 1236 A.D., when the barons refused to agree to a proposal of the prelates for assimilating the law

¹ See *Hume's History*.

of England to the Civil and Canon law in the matter of children born before wedlock. By the former systems of jurisprudence, the subsequent marriage of their parents admitted them to the rights of legitimate birth, and this was adopted by many modern States. The barons, however, chose to maintain the rules of the Common law of England which declared such issue illegitimate. The nobility, it is said, "would not change the laws of England which had hitherto been used and approved." A century afterwards the same thing is seen, when the nobility declared that "the realm of England had never been until this hour—neither by the consent of our lord the king and the lords of parliament shall it ever be—ruled or governed by the Civil law."

Who shall say that the particular case of the *bastard eigné* and *mulier puisné* (referred to by Co. Litt. 244) is not imputable to the art of the Norman ecclesiastics? Having failed, as just stated, to make the bastard legitimate on the marriage of his parents according to the Civil and Canon laws, the prelates did the next best thing under the circumstances, they showed him favour in certain conditions, and probably gave him the power to inherit which at that period he enjoyed.¹

The clergy were remarkable for their proficiency in the study of the law, indeed they were the repositories of all the law and learning of the period; they were also the professional lawyers of the day, and appeared in the temporal Courts as advocates.

It is not surprising, then, that the Judges were created out of the sacred orders. The Lord Chancellor (who gave suitors extraordinary relief in matters "of grace" where the Common law failed) was for centuries an ecclesiastic, so that our important system of equity jurisprudence has an undoubted clerical origin. Replete as they were with

¹ See Stephen's *Commentaries*, 14 Ed., Vol. I, p. 249.

all the learning of the period, they naturally possessed all the skill and subtlety; at all events they were ever alert and vigilant to promote their own interests and advantages to the uttermost. As one of the many expedients devised to defeat the Statutes of Mortmain, they originated, it is said, those "fictitious adjudications of right which under the name of Common Recoveries became the great assurances of the kingdom," and for nearly two centuries there existed a prolonged conflict between the religious houses and Parliament respecting the operation of these Statutes, the object of which was to prevent land being vested in these bodies. It can easily be seen that when great quantities of land were granted in *pious usus* (as was the case at that time), "the feudal services ordained for the defence of the kingdom would be minimised, and the stability of the kingdom endangered." Hence the original Act declared that all land conveyed (*inter alia*) to these institutions should (unless a licence were obtained for the purpose), be forfeited to the lord of the fee. To defeat the object of this enactment was the task of the clergy, and in this they were not altogether unsuccessful. At all events, we find that so soon as an Act was passed (and there were several of these Statutes of Mortmain), they set to work to devise means to prevent its operation or avoid its effects. A scheme having its origin in the Roman Law was adopted, by which the lands were conveyed to some third person *to the use* of the convent. This gave rise to the important Statute of Uses, familiar to all conveyancers, and which, as is well known, has still an important bearing on all dealings with the title to lands. Though the clergy, having the use, had at Common law no title to the land, yet in the Court of Chancery (which administered the equitable jurisdiction of the sovereign), presided over by one of their own order (a person no doubt deeply imbued with the Civil and Canon laws), it was adjudged that the prelates took the

beneficial estate and interest. It was in this manner Uses originated with all their attendant learning, advantages and inconveniences, and which in later years became universal, revolutionising the law of real property, creating in fact, new species of interests therein, and leading to new methods of conveyancing unknown to the Common law. By this method of raising a use the primary object of the first Statute of Mortmain was evaded, and so on for many succeeding years a continual warfare existed between the clerics and Parliament, neither being able to vanquish the other in legal acumen, honours we think being fairly even. In subsequent years Parliament periodically passed enactments attempting to prevent what we have above described, and the clergy with surprising art and ingenuity were occupied in devising means to avoid their effect. Erecting crosses on land, and taking them for a long term of years, were some of the means employed by them to attain their ends. The true spirit of the policy of the ecclesiastic at this period appears to be hit by A'Beckett in his *Comic History of England*, where he says: "Henry II, who took nothing but his breakfast, dinner and tea, was shocked and startled by the awful avowal of gluttony on the part of the monks of St. Swithin, whom he placed at once under a diet similar to his own, by reducing them to three meals *per diem*. It is probable that the monks crammed into three repasts the quantity they had previously consumed in thirteen, and thus eluded the force of the royal order."

Again, we might mention that it was one of the rules of the law of old times that immediately a person entered a religious house, and became a monk professed, he became as it were dead in law, as though he were an outlaw or attainted. He could make his Will and appoint his executors as though he actually were so. Hence it is, that formerly property was given to a man for his *natural* life, as it might be determined by his civil death, as when he

entered a monastery. Civil death cannot, however, now take place by profession.¹

The clergy were not in a position to perform any secular service, such as knight service, in respect of the lands held by them, as most other holders had to do under the feudal law; but they were not thereby exempt from all service. In lieu of such service, they prayed for the souls of the donor and his heirs, dead or alive, and the land was subject to the *trinoda necessitas*. The tenure by which they held the land was the old Saxon tenure of *frankalmoign* (*libera eleemosyna*), or divine service. "This was the tenure by which almost all the ancient monasteries and religious houses held their lands, and by which the parochial clergy and very many ecclesiastical and eleemosynary foundations hold them to this day."

In old days the parish Church was served by one of the inmates of a religious house, who almost without exception belonged to some grade of the ministry. The recluses appointed the parson and gave him a nominal sum for his services, while they took for themselves or appropriated the main profits of the benefice. After their dissolution, in many cases, these appropriated benefices, by virtue of the King's donations, became vested in laymen. Hence the *lay impropriators* of the present day.

The clergy had the privilege at one period of taxing themselves in Convocation, but they have not done this since 1663. Having now the right to vote for a member of Parliament, another method prevails which taxes the clergy along with the laity:

The ecclesiastics, as is well known, had exclusive jurisdiction in matters testamentary and matrimonial prior to 1857, when the Act 20 & 21 Vict. deprived them of this power. Previous to this Act these matters were under the exclusive cognisance of the clergy for centuries.

¹ *Rex v. Lady Portington, 1692.*

The "benefit of the clergy" and "right of sanctuary" were important rights which a criminal possessed in former times, and these matters were closely connected with the religious life of the past. Both these rights have been abolished, the former by the Criminal Law Act 1827, and the latter in 1623 by 21 Jac. I, c. 28.

Of course respect is shown at all times and in all ages to ecclesiastical personages, but after allowing for this we must admit that what has been stated above amply proves that the ecclesiastics had the power, and exercised it, of warping in their favour the undeveloped juridical system of their era. That the past religious life is intimately connected with our legal system and has had considerable influence in moulding our Common law into the form we find it to-day is, we think, almost a truism.

MATTHEW G. JOHNSON.

III.—THE BAR IN FRANCE.—PART II.

WE have seen how the fortunes of the Bar of Paris were, down to the Revolution, constantly associated with those of the *Parlement* of Paris. The accession of Louis XVI, followed by the exile of the Chancellor Maupeou, brought back at one and the same time the ancient Court and the ancient Order. The address of the new chancellor in 1774 announced the re-establishment of the old condition of things, that the King was determined, for the welfare of the Bar, to suppress the office of "advocate of *Parlement*," to relegate the procureurs to their legitimate functions, and to restore to the advocates their traditional pre-eminence.

The history of the *Parlement* was, however, thenceforward a chequered one. The struggle with the Crown was renewed. In vain it strove to limit unpopular exactions. The doctrine

of the administrative power of the Parlement over State affairs was carried theoretically to its highest point, whilst it was sought to reduce its actual power to the unquestioning registration of the Royal edicts. It is difficult to say how far the opposition of the Parlement to the Crown was due to its sense of patriotism, and how far, fearful of the powers of other classes, it had regard to its own interest. Sometimes it maintained its opposition, sometimes it grudgingly gave way, postponing the assertion of constitutional rights. In 1786 the Royal expedient of a Council of Notables failed. In 1787 the Parlement resolved that the nation, represented by the States-General, had alone the right of voting taxes, unforeseeing that the actual organisation of justice and the Parlement itself would so soon disappear in a new order of things brought about by the States-General. A *lit de justice* directed the territorial subvention. A few days later that decree was termed in the records of the Parlement, "a vain phantom of deliberation," and the edicts were declared incapable of depriving the nation of its rights. *Lettres de cachet* were issued, and the Councillors were banished to Troyes.

During this time the Order of Advocates was veritably concerned to support every project of reform. Not only from a view of Constitutional law, but because every withdrawal of the Parlement from duties of State administration tended to confine it to its legitimate scope by freeing the administration of justice from the embarrassment of public controversy. The departure of the Parlement to Troyes, however, meant the cessation of judicial work.

One of the privileges of the Bar of France is the authentication of every pleading by the signature of the advocate. This custom was re-enforced in these troublous times. In 1775 the Bâtonnier of the order took steps to limit the mischief of such publications as the *mémoires* of Linguet and those of Beaumarchais, which had had effects so widespread.

His proposal led to the renewal of the declaration of 1713, which forbade the publication of pleadings without the signature of an advocate on the Roll of Court, and added the prevention of their being printed without the same signature being attached.

Amongst the hastening events of the time was the famous process of the "Diamond Necklace," which was amongst the last of the trials before the Parlement of Paris in 1786. Its exile to Troyes followed in the next year. The King, however, "satisfied of its fidelity and its obedience," recalled it to Paris amidst the acclamations of the populace, and it enjoyed with some fluctuations a short-lived triumph. In the month of September, 1789, the Parlement went to its last vacation. A decree followed deciding that its vacation should be perpetual,—"*Ils sont en vacances qu'ils y restent*," said Mirabeau. On the 16th August, 1790, a decree on judicial organisation suppressed it altogether, after a continuous life of 472 years from that day of Philip the Long when first it had been definitely fixed at Paris. As a judicial tribunal it reached a very high point of merited honour; as a body politic its career was to a like extent ignoble. With the ancient Parlement fell the Order of Advocates. So intimate had been the association between them that it was almost impossible that one should survive the other. Another reason for the fall of the Order not less insistent related to the Order itself. The principle of an apparent equality was so fixed in the public mind that it was regarded as a thing impossible that men should be singled out from the general body of citizens on whom should be conferred the privilege (and its attendant honours) of the exercise of the profession of an advocate. Some of the Councillors of the Parlement, like Hérault de Séchelles and Saint-Fargeau, tried, with varying success, to purchase a tenure of power by participation in the excesses of the Revolution. One orator alone raised

his voice with vigour against the suppression of the Order of Advocates. "The Bar," said Robespierre, "seems to shew still that liberty which is banished from the rest of society; it is there that still one finds courage and truth which dares to proclaim the rights of the oppressed against the crimes of the oppressor." And again, in opposing a project to alter the character of the function of an advocate, "You wrest from nature, you degrade functions precious to humanity, essential to the progress of public order; you close this school of civic virtues where talent and merit learn, in pleading the cause of citizens before the judge, how one day to defend the cause of the people amongst the legislators." These words were little heard. The laws of 1790 abolished the Order of Advocates. The *hommes de loi* who were established to succeed the advocates were to have neither order nor incorporation nor any specific costume. Even the library of the Order was confiscated.

Though the Revolution destroyed the ancient Order of Advocates, there was always a chain of continuity stretched across the gap between the old Bar and the new. The last Roll of 1789 contained six hundred and seven names. Of these about one hundred and fifty advocates, whilst accepting the revolutionary title of "men of law," and without any legitimate corporate institution, still remained united in a kind of free society, preserving amongst themselves the usages and the discipline of the ancient Order, never allowing themselves to be confused with the incapable and unprincipled persons who were thrust into association with them, and who presented themselves before the novel jurisdictions. It must not be supposed that the new judicial constitutions were without their abiding value. To the pecuniary mulcts of the early Kings had succeeded such barbarities as the torture, death freely decreed for offences trivial, and secrecy of procedure, that it needed a revolution

to put the administration of justice in criminal trials upon a modern basis. To assert once and for all the right of every accused to be defended, and to be defended publicly, was in itself a great step forwards. The completion of the safeguard by the grant of an advocate was to come with the restoration of the Order. Meanwhile through this dark time the ancient advocates kept their traditions alive.

The trial of Louis XVI belongs wholly to the domain of history. It is not easy for men outside a period of terror to calmly judge the effect of that terror upon those within its shade. The refusal of Target to undertake the defence of the King, the acceptance of Tronchet on the ground of humanity to present the case of Louis Capet, the devotion of the veteran Malesherbes, the attachment of de Sèze; all these are historic facts, just as the crime of Billaut-Varennes, which cannot be studied without their context. It is, however, clear from the memoirs of Berryer Père that the great leaders of the Bar of Paris had bound themselves in a confederacy of defence, if to any one of them had come a request from Louis XVI to appear in his defence. The opposition of this great mass of the Bar to the excesses of the Revolution was in the highest degree courageous. At length the Revolutionary Tribunal left only a mockery of judicial procedure. In the year 2 the advocates ceased to exercise their functions, the *avoués* were suppressed. It was naturally only by slow degrees that the systematic administration of justice was evolved from the Reign of Terror.

Napoleon arriving at power in the year 8, under the title of First Consul, realized that his greatest glory might be that of legislator. The Code Civil elaborated by Tronchet, Bigot, Portalis, de Malleville and Ferey, was discussed at the Council of State in the presence of Napoleon. The new Bar was to commence with the publication of the First Title of the Code Civil—but not the Order of Advocates

which was still in abeyance. The costume and the title were decreed, the functions and the qualifications were restored, the roll and the oath were projected if not yet presented, but not yet the Order. In 1806 Ferey left his library and a legacy to the Order of Advocates under whatever name the Emperor should judge it advisable to re-establish it. Bellart in 1810, in his eulogy of the giver of the gift, called for the fulfilment of the long-deferred promise of re-establishment. Cambacères was authorised to demand from the Emperor a concession which Imperial distrust made difficult.

The feeling of Napoleon Buonaparte was naturally against an independent Order of Advocates, for the influence of such a body would of necessity be a standing menace to arbitrary rule. "They are," says an Imperial memorandum, "the artificers of crimes and treasons. As long as I have my sword by my side I will not sign the decree for the restoration of their independence. I intend that one shall be able to slit the tongue of any advocate who may use it against the Government." However, the force of public opinion could not be for ever withstood—at length in 1810 a decree of limited restoration followed. Its preamble is couched in terms sufficiently full of recognition of the Bar. "We have directed the re-establishment of the Roll of advocates as one of the means appropriate to the maintenance of uprightness, delicacy, disinterested conduct, the wish for conciliation, love of truth and of justice; a flaming zeal for the cause of the weak and of the oppressed, the essential foundations of their state. In retracing to-day the rules of that healthful discipline of which the advocates shewed themselves so jealous in the greatest days of the Bar, it is necessary to secure to the magistracy the control which ought naturally to belong to them over a profession which has relations so close with the magistracy. Thus we shall at the same time have secured the freedom and the nobility

“ of the profession of the advocate, whilst assigning the “ limits which ought to separate it from licence and from “ insubordination.” Thus far the preamble—but the decree of 1810 by no means complies with this forecast.

The principal points to which it is necessary to direct attention in the decree itself are the following. The Roll of advocates was to be submitted to the Minister of Justice. Without his permission an advocate was not to be permitted to plead outside the particular Court. Acceptance for the preliminary stage of training was to be preceded by an oath of obedience to the constitution of the Empire and by an oath of fidelity to the Emperor. The *Conseil de Discipline* was to be thus formed: out of thirty candidates selected by the Bar fifteen were to be selected by the Procureur-General and were to constitute the Council. The Bâtonnier was to be nominated by the Procureur-General. The powers of the Council regarding the discipline of the Bar were defined and limited. The Order could only be allowed to assemble together on the convocation of the Bâtonnier for the purpose of selecting candidates for nomination, and every other meeting was forbidden under penalties. Any case of attack, either in the course of pleading or by writing, on the principle of monarchical government, on the constitutions of the Empire, on law, or on the authorities established, was to be subject to the power of the Court to award fines and penalties. It was the duty of a Government department to see that these limitations were observed. The Minister of Justice could of his own initiative punish an advocate for any supposed violation of these rules. Any advocate could be charged by any Court with the obligation of pleading in a civil affair. Advocates had, as Cresson points out, to render accounts and to give receipts for their charges, an obligation which, although it had been directed by the ordinance of *Blois*, in 1579, had always been regarded as an oppressive infringement of the privileges of the Bar.

These were some of the restrictions imposed by the Imperial decree upon the Bar in France. It will be seen that in effect the rights of the members of the Bar fell far short of the ancient privileges of the Order.

The Bar, however, could in one respect scarcely complain. Side by side with a Bar of very limited privileges, was a judicial body robbed of its independence, and in many points deliberately placed under the control of Government departments. The judiciary itself had to submit to the presidency of the Minister of Justice when the government judged it expedient; the senate was able to annul all judgments and to suspend the judges for five years.

However, the decree of 1810 had a certain degree of usefulness. It was a considerable step towards the establishment of discipline, and in fear of an excess of licence one was disposed to accept anything at the price even of liberty. The ancient usage of the celebration of the Mass of the Holy Ghost, called the Red Mass, was re-established; the advocates were ready to assure the Court of their resolution to exercise their functions before it. The formation of the Roll of advocates was proceeded with by the first President of the Court and the Procureur-General, assisted by six of the foremost of the ancient advocates. The decree of 1810 had made no mention of the re-establishment of the "Colonnes," but in imitation of what existed before 1790, the Roll was divided into six colonnes, at the head of which were placed the members of the Council. The work of re-organisation was completed in 1812 by the re-establishment of the *Conférences de Doctrine* held by the Bâtonnier in the presence of the members of the Council. Thus, after twenty years of interruption in form, but in reality after a suspension lasting only during the most gloomy days of the Revolution, was re-established the Order of Advocates.

The costume of the advocates was decreed by the First

Consul in the following: "*La toge de laine, fermée par devant, à manches longues, toque noire, cravate pareille à celle de juges, cheveux longs ou ronds,*" and the direction was given that, according to ancient usage, the advocates should uncover when opening the pleadings or reading the documents in the litigation—in other words, when acting as procureurs.

The almost complete silence imposed by the Imperial system upon the advocate of that day may be judged from the case of the Mayor of the town of Anvers, who was accused in the year 1813 of peculation of municipal funds. Berryer obtained the acquittal of the accused by a jury of the Assize Court of Brussels, whereupon Napoleon wrote from Dresden to Paris ordering that the mayor should be sent for another trial, and if necessary the jury as well; and the senate annulled the verdict of acquittal and ordered a new trial before the same Court without a jury.

In the early part of 1814, on the invasion of France, the administration of justice was interrupted, the national guard was re-organised, and advocates pleaded at the Bar in military uniform. It was in this year that a decree decided that the Council of Advocates was absolute master of its Roll, and could regulate admission without being obliged to disclose its grounds of refusal.

The events of 1814 found the Bar somewhat disunited in the acceptance of the returning dynasty; but the King was not slow to recognise the value of the support of the Order. "*L'ordre des avocats,*" said he, "*s'est acquis une gloire immortelle; c'est dans son sein que s'est trouvé le défenseur du meilleur des rois.*" From this time onwards there was no cessation in the struggle of the Bar for the reassertion of its ancient privileges. In 1816 Bellart demanded, but without avail, the re-establishment of the Order on the widest foundations. He pointed out that the Royal Court and the civil tribunals of Paris were reorganised, and asked what remained to complete the great work except the restoration of the Order

of Advocates. The conference of advocates had been suspended, but its sittings were again renewed, and organised anew a system of official defence of persons accused. Advocates who were nominated were forbidden to receive remuneration, whatever might be the result of the process, from those who declared themselves not to have means sufficient for existence. Until, however, the year 1822 the Bar remained organised under the decree of 1810.

In the year 1822 arose a domestic discord in the ranks of the Order. According to the decree of 1810, at the end of the judicial year the entire Order nominated thirty candidates, from whom the Procureur-General chose the Bâtonnier and fourteen members of the Council. The choice had almost invariably been made from those senior members of the Bar who were supposed to be well affected to the monarchy. The Bar at length, irritated by this system of selection, presented to the Procureur-General in the thirty nominations names of younger men little agreeable to the government. The elections were annulled. The whole question of the organisation of the advocates could no longer be postponed. The Chancellor made a report which was intended to be the foundation of a new constitution for the Bar. "*La profession d'avocat est si noble et si élevée, elle impose, à ceux qui souhaitent de l'exercer avec distinction tant de sacrifices et tant de travaux; elle est si utile à l'Etat par les lumières qu'elle repand dans les discussions qui préparent les arrêts de justice que je craindrais de manquer à l'un de mes devoirs les plus importants si je négligeais d'attirer sur elle les regards bienveillants de votre Majesté.*"

The ordinance which followed expressed the wish of the King to grant to advocates exercising in the Courts the full measure of the right of discipline which, under preceding Kings, had raised it to the highest point of professional honour, and perpetuated in its midst the unaltering tradition of its privileges and of its duties. Henceforward no more

control in the hands of ministers of the Crown of censuring, of suspending, or of striking off the Roll of advocates any member without appeal; no more nominations of offices for the purpose of dealing with civil causes; no more annoying limitations on professional remuneration; no longer necessity for receipts for fees against which the advocates had protested for two centuries. The ancient usages of the Bar were at every point completely recognised. The ordinance took away from the Procureur-General the power of selection of the Bâtonnier and gave it to the council of the Order. It must, however, be confessed that this council (by reason of its system of "colonnes") was bound to be mainly in the hands of the seniors. Much indignation was directed against a council which, although always composed of honourable men, contained few active in the exercise of the profession. At length, in 1830, there was a provisional ordinance giving to the Order the fullest liberty over its elections, and from that time to this the ordinances of the council of advocates have been, to use the words of Cresson (whose work on the usages of the profession in France affords a constant guide), "*les défenseurs vigilants de l'honneur de l'ordre des avocats.*"

I now conclude with the words of Gaudry, to whom I am indebted for so much of what has here been set forth regarding the history of the Bar in France. "*Nous avons mérité le nom d'ordre célèbre que les anciens parlements nous avaient donné. Ce titre ne doit pas être perdu pour nos contemporains et pour la postérité. Il nous dit que notre union a été et sera toujours notre force et notre honneur; la gloire des uns, la science des autres, le zèle et le dévouement de tous, composent un faisceau qui a résisté à toutes les attaques.*"

EDWD. S. COX-SINCLAIR.

IV.—JUDICIAL LIABILITY.

JUDICIAL liability is a subject which is rarely investigated, because, happily, the necessity seldom arises. It is generally known that our judges enjoy considerable immunity in the exercise of their functions; but no desire is felt, save upon rare occasions, to pry critically into the privileges of this highly respected class of the community either for the purpose of taking proceedings against a judge or to enquire whether the immunity should not be somewhat curtailed. We propose in this article simply to state where a judge is protected, and where not, against proceedings at the suit of dissatisfied litigants. The privilege arose when the king, by royal prerogative the administrator of the laws, delegated his judicial duties to certain of his selected subjects, who were directed to execute them as the royal deputies, the original Court of justice where causes were tried being the Court of the king, or the place where he sojourned for the time being with the royal retinue. As the king can do no wrong, we are not surprised to read, in *Floyd v. Barker*,¹ that "the judge is the delegate of the royal power and the custodian and guardian of the royal oath, and forasmuch as this concerns the honour and conscience of the king, himself should take account of it and no other." Only the judges of the king's Courts enjoyed this privilege originally, and the rule became firmly established that these officers should be immune from all liability for all acts done by them within their jurisdiction. The ratio of this in theory is distinct from that of the better-known rule that judges of a Court of record enjoy the same privilege.

In the former case it was the mantle of the prerogative that sheltered, in the latter the sanctity of the record. The distinction, however, is very slight and really amounts to no more than this, that the former was subjective and

¹ 12 Rep., at 25.

the latter objective, for as to the latter we observe that the records were only made in the king's or royal Courts, and they were deemed to record the adjudication of the king himself. These records could not be impugned. The suitor could not go behind them, either to say that true justice had not been administered, or that they omitted significant facts (*e.g.*, judicial dishonesty or *mala fides*) relative to the proceedings. At 12 Rep. 24, it is stated that "the records are of so high a nature that for their sublimity they import verity in themselves; and none shall be received to aver anything against the record itself." The rule as to the defence offered by a record is aptly crystallized in *Kempe v. Neville*,¹ where it specifically observed "that the rule that a matter of fact adjudicated by a judge cannot be put in issue in an action against him has been uniformly maintained." The well-known authority, *Anderson v. Gorrie*,² with the late Lord Esher as the mouthpiece of the Court, affirms the principle that a judge of a Court of record is not liable for misconduct in the performance of his duties. By way of explanation of this statement, we refer to the following amplifications. The same case declares that it exists even though the judge acts maliciously and contrary to good faith.

Hamilton v. Anderson,³ a case in which it transpired that a judge had in some prior proceedings insisted upon a step in procedure which was totally unnecessary and extremely painful to the lawyer engaged before him, shows that it is not lost even though the judicial action has been harsh and arbitrary. In *Haggard v. Pélicier Frères*,⁴ Lord Watson declared that a judge is not deprived of this defence even where he has acted dishonestly, for in such a case the proper remedy against a miscarriage of justice is a representation to the authorities whose duty it is to see that justice is administered with due care and attention. The

¹ 10 C. B., N. S., at 549.

³ 3 Macq. 363.

² L. R. [1895], 1 Q. B., at 670.

⁴ L. R. [1892], A. C., at 68.

rule also, as appears from *Floyd v. Barker*, covers criminal misconduct on the part of a judge, though the authorities draw a distinction as to this between criminal misconduct in the course of proceedings and anterior misconduct, such as improperly conspiring to cause legal proceedings to be taken against any person. Various reasons *ex post facto* have been assigned for this judicial sanctity. Lord Esher declares that otherwise the judges would lose their absolute freedom and independence, which are essential to the proper administration of justice. Chief Baron Kelly states practically the same thing, but in a different form.¹ His lordship holds it to be "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." A further inconvenience is also pointed out in some of the authorities, namely, that if a judge might be sued in respect of his judgment, controversies would be infinite; *et infinitum in jure reprobantur*. The reason for the rule of judicial liability has therefore been ascribed in all to five causes:—(1) the shelter of the prerogative, (2) the sanctity of the records, (3) the security of the judicial officer, (4) the welfare of the public, and (5) the fear of endless litigation. A student approaching this question *de novo*, without any previous knowledge of our laws, would not unnaturally expect to find that there was a rule as to judicial liability applicable to the judicial office in general or to every judicial officer in whatever tribunal he might exercise his functions. But this is not the case. It is a question of graduation. One steps down from the high pedestal of the High Court judgeship on to the broad platform of the Courts of record, and then by stages descends to Courts not of record, to the quasi-judicial offices, and to mere quasi-judicial duties, until one comes down to the discretion of the public officer, which is outside the scope of the present subject.

¹ *Scott v. Stanfield*, L. R., 3 Ex., at 223.

Still, dealing with judges of Courts of record, we notice that the rule is also to be found in Scotland,¹ and in Ireland.² It exists, too, unless limited or taken away by statute, to the superior Courts in the Colonies. The privilege has likewise been extended to the judge of a consular Court abroad, although these Courts are not of record. Lord Mansfield stated the reason for this to be, that judges of English Courts abroad, whose decisions are subject to superior review, are to enjoy the same privileges.³ Other Courts of record, besides the superior Courts, are County Courts, so made by statute 51 & 52 Vict., c. 43, s. 5, and Quarter Sessions.⁴ A Court Martial furnishes another instance of the fact that some Courts, though not technically of record, rank as such for this purpose by reason of their dignity and importance.⁵ The Coroner's Court is a Court of record, but the Coroner's Act of 1887 has limited the privilege formerly enjoyed by the coroner.

The question has frequently been raised as to whether the immunity of a judicial officer extends to acts which are merely ministerial and not judicial in the strict sense of the term. So far as a Court of record is concerned, the doubt, if it exists, finds no support in the authorities. In *Anderson v. Gorrie* the point was raised, but the Court ignored it in delivering judgment. In the case of *Taaffe v. Downes*,⁶ Mr. Justice Fox declared that a judge of the High Court always acts judicially in the performance of his duties and never ministerially. His lordship, however, does not apply this observation to judges of other Courts of record. He rather bases his opinion upon the fact that the High Court judges hold a closer relation to the Crown and are more immediately identified with the execution of the royal

¹ *Miller v. Haggart* (2 Shaw's Sc. App. Cas., at 143).

² *Ward v. Thomas* (2 Ir. C. L. R. 460).

³ *Mostyn v. Fabrigas* (Smith's L. C., 11th Ed., Vol. 1, 604).

⁴ *In re Pater* (33 L. J., M. C. 142).

⁵ *Scott v. Stanfield* (L. R., 3 Ex., at 223), *per* Kelly, C.B.

⁶ 13 Eng. Rep., at 25.

prerogative in the administration of justice. Of the three cases in which a judge of a Court of record is liable to adverse proceedings two are in respect of extra-judicial acts, and one in respect of acts *ultra vires*. The first has been alluded to previously. The second is where he descends from his judicial office and acts in his private capacity.¹ It would be interesting in this connection to consider the position of a judge who is asked by litigants to hear a case personally and not in his character as judge of the Court. Such a thing happened in the case of *In re Durham County Permanent Benefit Building Society, ex parte Wilson*,² where the parties to winding-up proceedings signed an agreement to refer certain questions to the determination of the judge. It was afterwards held that the reference was to the judge personally and that no appeal lay from his decision. In such a case could it be held that the judge divested himself from his original character, and assumed the quasi-judicial character of arbitrator? If so, though not liable for negligence, he would be liable for *mala fides*.

With reference to acts *ultra vires*, it is clear that a judge does not, where he has original jurisdiction over the subject-matter of an action, forfeit his immunity by making a mistake in procedure. Thus, where a judge had power to cite a person who had intermeddled with the goods of a deceased intestate to take upon himself the administration of the estate, but omitted in the citation to give him the option to renounce, and then for disobedience of the irregular citation, excommunicated him, it was held that the judge had acted *intra vires* although the excommunication was afterwards set aside.³ On the other hand, an action was successfully maintained against an ecclesiastical judge for making an order excommunicating the complainant who

¹ See *Bradley v. Carr* (2 Man. & G. 221).

² L. R. [1871], 7 Ch. App. 45.

³ *Ackerley v. Parkinson* (3 M. & S. 411).

had refused to perform an act which the Court had no power to order him to perform.¹

Where the question of jurisdiction depends upon the presentation of certain material facts to the notice of the judge, *e.g.*, as to the domicile or nationality of the defendant, the aggrieved person must show that such facts were brought to the notice of the Court as would have enabled the judge to perceive that he had no jurisdiction over the subject-matter of the action.² An assumption of jurisdiction, made upon a mistake of law, solely, affords no defence to the judge.³ The authorities defining what amounts to an excess of jurisdiction are chiefly to be found in connection with actions against justices of the peace, and a perusal of these will reveal more fully the principles upon which this branch of the law rests, for there is no difference between Courts of record and Courts not of record in this respect.

A judge does not exceed his jurisdiction by trying a case in which he has a personal interest, and his decision is not void but merely a voidable one.⁴

The immunity enjoyed by judges of Courts not of record for acts performed within their jurisdiction is a limited one only. What it amounts to will appear from the following *dicta*. In *Floyd v. Barker* we find these words: "But in an hundred Court, or other Court which is not of record, there averments may be taken against their proceedings, for that is no other than matter in pairs, and not of record." Again we find Lord Tenterden declaring:⁵ "Even inferior justices, and not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction." And his lordship continues: "Corruption is quite another matter, so are neglect of duty and misconduct."

¹ *Beaurain v. Scott* (3 Camp. 388).

² *Calder v. Halkett* (3 Moo. P. C. 28).

³ *Houlden v. Smith* (14 Q. B. 841).

⁴ See the Opinion of the Judges in *Dunes v. Proprietors of the Grand Junction Canal and others* (3 H. L. Cas., at 785-6).

⁵ *Garnett v. Farrand* (6 B. & C., at 626).

But these officers are not liable for a mere misfeasance, such as a trespass.¹ A judge of a Court not of record, therefore, is under a double responsibility—he is bound to exercise his office, and he is bound to act with *bonâ fides*. Shorn of the artificial protection afforded to judges of Courts of record arising out of the royal prerogative, we see that the last mentioned is the true position of the judicial officer in England at Common law—he is, and to this extent is like all other persons with obligations, bound to perform his duty honestly and in good faith. The position of justices of the peace has been modified by the Justices Protection Act 1848.² They are now no longer liable to criminal proceedings for acts done within their jurisdiction. All such proceedings must be taken as for tort, and malice and absence of reasonable and probable cause must be alleged and proved. As to acts outside their jurisdiction the law remains unaltered. The Act applies to purely ministerial as well as to judicial acts.³ This statute does not afford any protection to police officers when dealing judicially with minor offences.

Any judicial officer who is permanently attached to a Court enjoys the same measure of protection as the regular judge, the test in such cases being—is he a constituent part of the Court?⁴ The position of arbitrators and quasi-arbitrators, *i. e.*, persons privately employed by parties to adjust disputes between them, can only be referred to here by observing, generally, that (apart from statute) persons holding quasi-judicial offices are in the same position as judicial officers not of record—they are not liable to proceedings at the suit of the parties before them for negligence, but only where they act maliciously, oppressively or corruptly.⁵

¹ *Holroyd v. Breare* (*infra*).

² 11 & 12 Vict., c. 44.

³ See *Linford v. Fitzroy*, 13 Q. B. 247, *per* Lord Denman (C. J.), as to the earlier law.

⁴ See *Holroyd v. Breare* (2 B. and Ald., at 477).

⁵ *Acland v. Buller* (1 Ex. 837), (a Tithe Commissioner); *Cullen v. Morris* (2 Stark 577), (a Returning Officer).

Arbitrators privately employed are not liable so long as their only faults are want of skill or negligence.¹ For *mala fides*, of course, they can be punished. A surveyor or architect, or other professional man, whose duty it is to certify for payment for work done, is not liable for a captious refusal to certify, unless he is acting in collusion with one of the parties.²

Such is in outline the law of judicial liability, and so it is likely to remain for many years to come unless anything unusual occurs to demand the introduction of a change, for there is no evidence of any tendency in the judicial decisions to alter the well-recognised principles. To a purist it may have its defects, but it is the outcome of many centuries of experience, and it works well. Shortly reviewing the principles we find that the law upon the subject may be stated in a few sentences as follows. Whenever a man is called upon to exercise functions of a judicial nature, it is assumed that he possesses and will exercise the necessary skill, and no judicial officer, therefore, can be charged with incompetence or negligence. Premising this, we observe next that a normal view is taken of the position of a judicial officer unless he is sheltered by a record, and he is liable, both civilly and criminally, at Common law, for corruption or *mala fides* in the exercise of his office. In the case of a judge of a Court of record we find there is complete immunity for acts within his jurisdiction. No judge of a Court of record has ever been held responsible for acts of a ministerial character, but in the case of justices of the peace several attempts were made before the Justices' Protection Act 1848 to establish such a liability, probably owing to the fact that these officers were originally merely police officers auxiliary to the sheriff, and grew into greater importance as the office of sheriff dwindled, until in the reign of Edward III they were endued with judicial functions.

W. W. LUCAS.

¹ *Pappa v. Rose* (L. R., 7 C. P. 525).

² *Ludbrook v. Barrett* (46 L. J., C. P. 798).

V.—PROPOSED PATENT LEGISLATION.

AT present there are three Patent Bills before Parliament—the Government “Patents and Designs Bill,” another Government measure entitled the “Patents and Designs (Consolidation) Bill,” and also a private Bill called the “Patents and Designs (No. 2) Bill” introduced by Mr. Dundas White. As far as can be judged at the present time the first measure will pass into law this Session, while little or no progress will be made with either of the other two. The Consolidation Bill, as its name implies, is intended to make a sort of Code of Patent Legislation, and provides for the repeal of all the Patents Acts from 1883 to 1902. Mr. Dundas White’s measure is designed to amend the existing law in several respects. The first clause provides that the actual “true and first inventor” must be joined in all applications for patent, and that simple importation or communication from abroad shall no longer be sufficient to justify a grant. Under other clauses articles are only to be marked “Patented” while a patent is actually in force, and as part of such marking it would be necessary to add the year and number of every patent referred to. In addition it is provided that no action for infringement shall succeed unless the distinguishing numbers of all patents relied upon were marked upon the genuine patented articles, or else the infringer had express notice of the patents concerned. According to clause 4 no injunction shall be granted unless it has been proved that the plaintiff is prepared to supply goods to the public at a reasonable price; that the infringement has caused him a substantial monetary loss, and that damages would not be a sufficient remedy.

The chances of this Bill becoming law are so remote that it is hardly worth while attempting any detailed criticism of the principles involved. It is sufficient to point out that infringement would be rendered much more profitable

and less risky than even now. In every case the plaintiff would have to prove that notice of all his patents had been given to the defendant, either by marking on his patented articles or by express notice brought home to the infringer. The defendant on the other hand would be entitled to avert an injunction by setting up that the plaintiff was not supplying the public at a reasonable price, or that the infringement had not caused him substantial monetary loss. Everyone who has had any experience of patent litigation knows how difficult it is to repress infringements even with the aid of the present law. A manufacturer often knows perfectly well that infringements of his goods are being sold up and down the country to a considerable extent, and yet there may be great difficulty in obtaining conclusive evidence even of a single sale. To say that a patentee shall not obtain an injunction unless he can prove that damages would not be a sufficient remedy, in practice would often be to take away his whole patent rights and give nothing in exchange.

Going back to the Patents and Designs Bill—the measure introduced by Mr. Lloyd-George—we find several radical departures from the principles which have been in vogue so far. Some criticism has been directed against the Bill because of the rhetorical flourish with which it was introduced, and the lengths to which freedom of contract has been interfered with for the purpose of releasing Boot and Shoe Manufacturers from improvident engagements which they have willingly or unwillingly entered into. It is true that when introducing the measure in the House of Commons the President of the Board of Trade expressed more sympathy with the “poor inventor” and more antipathy to the “powerful syndicate” than the wording of the Bill contained. In fact, the Bill itself treats all inventors as being on the same footing, and puts no premium on poverty or disability on wealth. The principle of freedom to contract has suffered such inroads that few are likely to object to

the way in which the Boot and Shoe Manufacturers have been dealt with, except those who have reason to complain that their contracts will not be kept. However, despite the apparently sweeping generality of the clause providing for avoidance of certain conditions attached to the sale or license of patented articles, it will be probably found feasible to tie up important patents in much the same manner as has hitherto been done.

The main provisions of the Government Bill centre round the two principles of compulsory licence and "working" of patents. The one has been tried in this country and found completely wanting; the other is an importation which seems no more likely to be successful here than it has been abroad.

In the discussion which has been aroused by the introduction of the Bill, attention has been directed chiefly to the proposals for mitigating abuses of the British law by foreign patentees.

Speaking in the House of Commons, Mr. Lloyd-George said that many British industries had been completely wiped out by patent privileges conceded by British institutions to foreigners; but he proposed that these bonds should be cut, and that British industry should be made perfectly free to engage on equal terms in the severe struggle with its competitors. The object of the Bill was to prevent the patent laws from being used for the hindrance and suppression of British industrial development, as in their present imperfect condition they were capable of being used. Out of 14,700 patents granted last year, 6,500 were foreign; many of which had been taken out for the purpose of preventing their being worked in this country. To prevent these abuses, he proposed to simplify the procedure of compulsory licence, and also to entitle any applicant to go to the Controller three years after the granting of any patent and apply for its revocation on the ground that the invention had not been adequately worked within the United Kingdom.

All this is very good in spirit, but it is to be questioned whether any practical result will be achieved if the Bill is passed in anything like its present form. The procedure for compulsory licence has proved a complete failure, and in providing that application shall be referred to a Judge of the High Court instead of to the Privy Council, the framers of the measure do not remove the causes which have rendered the system abortive so far.

At present the Privy Council may order a licence to be granted when it has been proved that the reasonable requirements of the public have not been satisfied, any existing industry or the establishment of any new industry is unfairly prejudiced, or the patent is worked exclusively or mainly outside the United Kingdom. Before the Patents Act of 1902 compulsory licences were to be dealt with by the Board of Trade. Then it was thought an improvement to transfer the jurisdiction to the Privy Council, and now it is proposed to try a Judge of the High Court instead. All this leaves the substance of the system unchanged. The difficulty of obtaining reliable evidence, the cost and trouble of proceedings, and above all the entire dependence upon individual initiative, have rendered the procedure of no avail.

The same objections apply with greater force to the continental system of "working" patents that it is proposed to import. Clause 10 of the Bill provides that a patent may be revoked after the first three years, on proof that manufacture is not carried on in the United Kingdom to any adequate extent. While agreeing with the spirit of the foreign laws, which require that after two or three years the local demand must be met by manufacture in the particular country, it should not be forgotten that in practice these provisions are of no effect.

It will be useless to import the Continental system of "working" unless the machinery is strengthened so as to prevent the obvious intention of the law being evaded by

technical compliance with the requirements which may be imposed.

There are no conditions as to "working" in the United States, but in Germany, France, Belgium, and some other countries, there are more or less stringent provisions on the lines proposed in the Patents Bill. In Germany, for instance, the law stipulates that in order to prevent a patent being withdrawn arrangements must be made whereby the demand of the German market is met to a large extent by actual manufacture in Germany. The grant of the patent and maintenance of the monopoly privilege is made dependent on German industry being employed. However, if a foreign patentee cannot find any one interested enough to take out a licence, the patent will not be withdrawn if he can show that proper attempts have been made. The result is that when each "working" becomes due an announcement is made in some paper stating that the owner of a certain patent is open to grant licences to local manufacturers, and where a specification and drawings may be seen. The advertisement is drawn up in a formal legal style, attracts no attention, and is not intended to. However, it is sufficient to keep the patent in force.

In countries where the law is less strict the patent agents who conduct the periodical "workings" do not even pretend to offer licences. In some places they have two or three patented articles put together in their office in the presence of witnesses, who are then ready to testify that the invention has been duly "worked."

As a rule patentees do not care to manufacture out of their own country, and consequently the efforts of the patent agents who conduct the periodical "workings" are directed to technical compliance with the minimum requirements of the law. No *bonâ fide* attempt to establish manufacture is made, and although many foreign manufacturers seem to think nothing of bold infringement, they do not

challenge the way in which the provisions as to "working" are evaded by technical means. It may be thought that, perhaps in this country, the Courts would refuse to be hoodwinked by such proceedings, but it must be remembered that the onus of proving that a patent has not been worked lies upon the person applying for revocation, and it is often a matter of the utmost difficulty to obtain any reliable evidence at all.

As they stand at present, the clauses of Mr. Lloyd-George's Bill seem no more likely to be successful than the more stringent provisions of Foreign law. In order to insure that the reasonable demands of the British Market are met by British manufacture, it appears necessary to meet the difficulty of obtaining evidence by requiring the proprietor of every patent to file returns, showing the extent to which the patented articles are dealt in and the places where they are actually made. These returns should be open to public inspection like the Company files at Somerset House. It is no use expecting private individuals to apply for revocation of patents which are insufficiently worked. For one reason, the cost is too great. The trouble is not met by assigning such applications to any particular tribunal. It is not the tribunal which makes patent litigation expensive, but the expert evidence and professional ability required. As long as able patent lawyers are able to command high fees, the procedure will be too costly, and apart from this, few persons feel sufficient personal interest to take steps. Either the work must be undertaken by a public Department or what is perhaps better, patents should become automatically void if correct returns are not duly filed, or when the annual sales exceed a certain amount and more than a suitable proportion of the patented articles made abroad.

J. SCOTT DUCKERS.

VI.—CIVIL JUDICIAL STATISTICS, 1905.¹

THE present volume contains statistics relating to the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court of Judicature, County Courts, and other Civil Courts. It is edited by Sir John Macdonell with his usual ability, and he contributes an introduction of about twenty pages from which we have selected most of the points to which we wish to call attention. The rest of the 200 pages or so, of which the book consists, is taken up with elaborate comparative tables, diagrams, and annual tables. There is also a full Index. .

In the proceedings begun in all Courts there is to be noticed a decline for the first time since 1897. This decrease consists of about 43,000 cases, which is accounted for almost entirely by a falling off of 39,000 in the number of County Court proceedings. It is interesting to observe that the learned Editor points out that this decline coincided with a decline in the criminal summary proceedings, and that the rise in civil proceedings from 1887 and following years was accompanied by a rise in indictable offences against property. Although the total is reduced, it is still considerably above the annual average 1901—1905.

Taking the Appellate Courts first, there is a slight falling off in the number of proceedings begun in both the Judicial Committee and the House of Lords, and it is also below the five years' average, but as regards the number of cases heard there was an increase in the Judicial Committee. The number heard was 92, as against 84 begun and 84 heard the previous year. This shows a slight clearing off of arrears. On turning to the table giving the particulars of the proceedings before the Judicial Committee we find that that was so, as at the end of the year there were 121

¹ *Judicial Statistics, England and Wales, 1905.* Part II.—Civil Judicial Statistics. London : Eyre and Spottiswoode.

appeals pending as against 147 at the beginning. Petitions for special leave to appeal show an increase.

The figures for the House of Lords show very little change, but there is one remarkable feature. Seventy-five appeals were adjudicated on, including the unusual proportion of 23 from Scotland; and out of these 38 were affirmed, 2 varied, and no less than 33 reversed. In fact, as regards the Court of Session, there were 14 appeals reversed and 1 varied as against 7 affirmed. We might have mentioned in noticing the Appeals to the Judicial Committee from Colonial Courts 21 were affirmed and 17 reversed.

There is a decline in the number of appeals entered in the Court of Appeal, chiefly in final appeals, and though a fewer number of motions for new trials, etc., were set down than in the previous, yet the average of the five years 1901-5 is considerably higher than that of the five years 1896-1900, being 115 against 80.

Taking the Courts of First Instance, there is a slight decrease in proceedings begun, the number, 6,489, being the lowest in the last 10 years. The highest is as long ago as 1896, when the number was as high as 7,933. It is curious to remark, however, that in that year there were only 460 actions tried as against 609 in 1905. Motions for Judgments and Summonses at Chambers have declined in a somewhat similar ratio. As regards the King's Bench Division there is a decline all round and in some classes to quite a substantial amount. The figures as regards trials by jury are interesting, the figures for the last five years show a slightly growing preference or revival of preference for trial by jury, being about 52 per cent. to 46 per cent. in the previous quinquennial period. In 1905 Special Jury trials were slightly more numerous than Common Juries for the first time since 1897. There is a marked decline in the business of the Commercial Court, only 127 actions having

been set down as against 167 in the year before. In the year 1900 this Court was most in favour, 293 cases being then set down. The great fall was in 1903, when only 163 actions were set down as against 243 in 1902.

The effect of the last County Court Act may be shown in the decrease in the verdicts for £100 and under, and this decrease is more marked on Circuit than in London and Middlesex, where we find the smallest and largest amounts recovered on verdicts. The figures of the amounts for which judgment was entered are interesting; after trial by Judge, £258,647, after trial with jury, £178,378, and under Order XIV, £1,761,133. These figures are given by the learned Editor in his summary, but do not quite agree with the figures in Comparative Table C, under the heading "Amount recovered on Verdict or Judgment after trial," so the calculation must have been made on some different basis. We should like to have seen the amounts awarded by Special and Common Juries respectively, but have not been able to find it. The total amount recovered in actions tried in London and Middlesex, on Circuit, and before Official Referees, is given in Comparative Table C as £513,482, the lowest amount since 1895, when it was £430,881. The annual average from 1901-5 was £643,878, and the highest amount given as recovered in the last 20 years is £849,078 in 1901. The amounts recovered before Official Referees vary considerably in different years, as is only to be expected, when it is to be remembered how very heavy some of the cases before them are, but it is certainly remarkable that while in the period of 1881-5 the annual average should be as high as £242,775, in the very next period the average should fall to £66,992. The table giving the Nature and Results of Actions for Trial shows some interesting facts. Only four actions on life policies were tried during the year out of 34 entered for trial, and three of these resulted in verdicts for the defendants. Actions on fire policies were

still scarcer, as only two were tried, and honours were divided, the plaintiff and defendants being each successful in one case. In breach of promise cases the plaintiff got 37 verdicts against 5 for the defendant, and the total amount recovered was £4,139, a falling off from the £5,626 of the previous year, and much below the five years' average of £6,920. Two of the verdicts were for sums between £500 and £100. In actions for nuisance the defendants got the best of it, succeeding in four cases and losing in two. In false imprisonment things went very evenly, the verdicts being 11 to 9 in favour of the plaintiffs. The only actions in which the defendants gained the majority of verdicts, besides those on life policies which we have already mentioned, are those for commission and fraudulent representation. The general proportion is much in favour of plaintiffs, being 1,408 to 546.

In view of the constant criticism of the Circuit system, it is worth while examining the figures with a little care. There was as usual a falling off both in the number of cases tried and the amount recovered as compared with 1904. The cases are 751 to 842, and the amount recovered £98,978 to £141,365. Part of this falling off may probably fairly be attributed to the last County Court Act, as it is likely that part of the great increase in the number of plaints for amounts above £50 is at the expense of the Circuits. There is a melancholy list given of Assize Towns at which five actions or fewer were entered, 28 in number. This number is increased to 37 in the next list, which gives the Assize Towns at which five actions or fewer were tried or disposed of, and in which list the South Eastern Circuit is sadly conspicuous. The Northern Circuit leads easily in business done and amount recovered, having disposed of 223 cases, about £50,000 being recovered, and the judges sat 227 days. It must always be remembered, and we think it is a fact to which often sufficient consideration is

not paid, that although time is wasted in short sittings and travelling, yet the sittings on Circuit are usually much longer than they are in London. It is rather a remarkable fact that there were more days on which prisoners were tried on the South Eastern than any other Circuit, the number being 90 as against 74 on the Northern Circuit, which comes next. There is a table, which we think is new, giving instances where, though actions and prisoners were few, the number of jurors summoned was very large. Perhaps the most striking instances of this are Flint and Radnor, where to try two prisoners at each place 215 and 216 jurors respectively were summoned. To those familiar with the working of the Circuit system, this will be known to be not so extraordinary as it appears. Cases are often settled after the jurors have been summoned; there must be separate panels of common and special jurors, and it is not pointed out how many of these were grand jurors.

Probate actions are not on the increase, and out of over 72,000 grants of Probate and Letters of Administration only 129 gave rise to actions, of which 120 were tried. There was an increase in the value of estates admitted to Probate, and in the last ten years the rise in value has been very considerable. The learned Editor gives a calculation "according to one mode of computation," that the total wealth of private persons in the United Kingdom liable to death duties was about £7,833,300,000.

There is an increase in Petitions for Dissolution of Marriage, etc., but they are below the average. The vast majority of these are for dissolution, and adding the other matrimonial suits the numbers presented by husbands and wives are very nearly equal, though, as might be expected, a great many more petitions for judicial separation are presented by wives than husbands, their numbers being 87 to 5. Forty wives petitioned for restitution of conjugal rights, while only five husbands were desirous of that remedy. A

total of 672 suits for dissolution were disposed of by the Court, and of these no less than 511 were undefended, and 597 were tried before a judge without a jury. 362 husbands and 261 wives were successful. Twenty-five wives and no husbands were successful in obtaining judicial separation, and twenty wives got restitution of conjugal rights, while the three husbands who had their petitions tried all failed. The King's Proctor intervened in 27 cases, in 19 of which he got the decree rescinded.

There are some very interesting tables setting out the duration of marriage and other circumstances in these cases. By far the largest proportion of petitions both of husbands and wives are presented after the marriage has lasted more than 5 and less than 20 years. In the table giving the husband's occupation at the date of marriage, we are glad to observe the proportion of barristers commendably low, but without information as to the numbers of persons engaged in each occupation, it is impossible to form any conclusions. There is no table given of the occupation of co-respondents, but we hope the profession would come out equally well. It is not surprising that the cases in which there are no children are the most numerous, and then come those with only one. Before passing from the subject of Matrimonial Causes, it is as well to point out that the number of magistrates' separation orders, which have the same effect as orders of judicial separation, during 1905 was 6,747, five less than the year before, and somewhat less than the quinquennial average. The distinction is made in this table between orders made on the application of the wife and those on the application of the husband.

There is a diminution in the work of the Admiralty Court, at least in the number of proceedings, but the Court sat more days. It is curious to note the appeals from inferior Courts. These are few, but the results are curiously even. In nine cases the judgment was affirmed and in eight reversed. In

1904 it was still more even, there being four cases each way. The proceedings before the Railway and Canal Commissioners show a considerable increase, the number of applications rising from 97 in 1904 to 145 in 1905. The Court, however, only sat 21 days. It heard 51 and otherwise disposed of 21 applications, leaving as many as 137 pending at the end of the year. In the Court of Chancery of the County Palatine of Lancaster, although fewer proceedings were commenced and actions heard, yet there was a larger amount of chamber work and much larger amounts dealt with.

A very important feature of this report is the reduction in the number of complaints issued in the County Courts. Though the proceedings have diminished, the aggregate amount for which complaints were entered has increased and is the highest that has been yet reached, while the average amount per complaint, £3 : os. 8d., is the highest since 1900, when it was the same. The amount of fees, £564,980, is the highest ever reached. An important but unsatisfactory feature is the large increase in warrants of commitment. In 1905 there were 216,523 orders of commitment made, and no less than 11,427 debtors committed to prison. In the year 1867, in which year was passed the Act of 32 & 33 Vict., c. 62, which was supposed to abolish imprisonment for debt, the number of persons imprisoned was 9,759. Some judges issue orders of commitment much more freely than others, as will be seen by an examination of Table LXXVI, or the selections from it given by the Editor in his introduction. The highest per-centage seems to be that of Stockton-on-Tees, where 6,281 complaints were entered, and 3,603 orders of commitment made. The neighbouring town of Middlesbrough has a per-centage of 54·7. Other high per-centages are Barnsley, 50·2; Pontefract, 47·4, and Dewsbury, 45·6. Birmingham, where the enormous number of nearly 67,000 complaints were entered, has a per-centage of only 12·0, while on the other hand the City

of London, with its 42,000 complaints, only issued 649 orders of commitment, or a per-centage of 1·53, and ten County Courts are distinguished by having issued no such orders at all. The causes of this diversity are hard to understand. They do not depend simply on the temperament or opinions of the Judge, as at Salford, the per-centage is 17·2 to 10·1 at Manchester, and yet the same Judge sits at both Courts, and one would think the local conditions were much the same. Luton, too, with a population of 52,586, has 97 debtors imprisoned, while Cambridge, on the same circuit, with its population of 79,000, has only 25. We have not been able to make out whether larger proportions of the amounts for which judgment was obtained were recovered in the more severe Courts; but the information given is not complete enough to base any opinion. We may here point out a mistake in Table LXXVI, where the population of Durham is given as 193,994, and describing Circuit No. 2 as Durham in the Summary simply, is very misleading, as it leaves out of that county Barnard Castle, Darlington and Stockton-on-Tees, which are, we suppose, included in the North Riding of Yorkshire. The so-called Nottinghamshire Circuit heads the list in matter of imprisonments, having 1,141 prisoners to 38,455 complaints entered, and a population of 623,305.

The proceedings under the Workmen's Compensation Acts 1897 and 1900, and the Employers' Liability Act 1881, remain very constant in number. The total number of cases in 1905 was 2,469—34 more than in 1904. An increased proportion was heard by the Judge, and the lump sum of compensation awarded was £106,118:os. 3d., in addition to payment of £331:3s. 1d. weekly. There is very little record of the cases under these Acts settled by agreement or informal arbitration. The Editor calls attention to the very large amount of Bankruptcy work done in the County Courts. Three-quarters, or 4,463 out of the

5,985 bankruptcy petitions filed in 1905, were filed in the County Courts; more than four-fifths of the receiving orders were made there. The average annual number of sittings before each Judge was practically the same, being 151·2.

The number of cases tried by juries in County Courts seems steadily to diminish, and was 866 as against 912. The number of actions heard by the Judge, with or without a jury, was 41,850 as against 419,861 determined before the Registrars. In the Mayor's Court there was an increase in the number of actions entered, but a slight decrease in the number heard. The business here has much declined of late years, in 1905 only 11,548 cases were entered as against 16,652 in 1887. The amounts claimed show a marked contrast to the County Court proceedings, as more than half the actions are entered for amounts between £10 and £20 and about one-tenth for amounts between £20 and £50. In County Courts, on the other hand, the plaintiffs for amounts under £20 number 1,325,000 against under 17,000 of the others. Some interesting figures are given of the cost of our Judicial system, from which it appears that the gross expenditure of all Courts in the year 1906 amounted to £1,487,504, and the receipts were £1,253,148. This makes the net cost work out at about £235,800. This is practically nearly divided evenly between the Court of Appeal and High Court of Justice on the one hand and the County Courts on the other. It would have been interesting to notice whether the decrease in business that has taken place in most Courts has been accompanied or not by a corresponding increase in expenditure; but the figures given do not enable us to make the comparison, as the years compared for business are 1905 and 1904, while the years of which the expenditure is given are 1906 and 1905.

VII.—RESPONSIBILITY IN LAW.

(Continued from page 197.)

VIII.

PASSING now from the consideration of capacity in relation to civil rights and duties, we proceed to inquire whether and how far a standard of conduct may be set up which shall involve the determination of criminal responsibility.¹

It appears to be pretty universally admitted that the vexed question of criminal responsibility is yet far from having received a satisfactory solution: and, this being so, at the outset it occurs to one to inquire how far the method of investigation commonly pursued has been the correct one.

It is now generally admitted: "that there is no such thing as absolute sanity or insanity," and that "the mere proof of insanity . . . does not, in the eyes of the law, destroy the conditions of responsibility and capacity."² We are here presented with a problem of two dimensions—in the direction of medical authority, to find "what is the essential element which separates insanity from other unfavourable mental conditions";³ and, in the direction of legal authority, "we have to see how far the conditions which are the results of [this essential element] have destroyed the power to form a correct judgment of the consequences of our acts, and

¹ In two treatises recently published, dealing in each case with Criminal Responsibility, we accept the views put forth as reflecting pretty accurately the medical and legal opinions on the subject. These are (1) Article in *Jurid. Rev.*, Vol. XVI, by Sir J. Batty Tuke and C. R. A. Howden, and (2) *Criminal Responsibility*, by Chas. Mercier, M.B.

² Sir Frederick Pollock's remarks on *McNaghten's Case*; *Revised Reports*, Preface to Vol. LIX; *Jurid. Rev.*, Vol. XVI, Sir J. Batty Tuke and C. R. A. Howden, *Relation of the Insanities to Criminal Responsibility and Civil Capacity*, pp. 12, 254.

³ Batty Tuke and Howden, *Relation of the Insanities to Criminal Responsibility*, pp. 9, 10.

to give effect in action to the judgment which we have formed."¹

First of all, then, we have to arrive at some working theory that will serve to discriminate the mental conditions of the sane from the insane: and, in accomplishing this, we shall already have gone far towards overcoming the difficulties which hitherto have stood in the way of reconciling the answers to be given respectively to the medical and the legal aspects of the problem.

We are not left in doubt of the view taken by medical authority in approaching this question. Insanity is treated as a disease disorder or defect, having its seat in the brain, and affecting "the whole individual who is the subject of the disorder." But, when the medical expert is asked for "a definite account of the course of the symptoms collectively constituting the disease," he is fain to own that "there is no such course of symptoms."² This position is no doubt satisfactory to the empiricist, who is content with the reflection "that the symptoms of insanity are extraordinarily multiplex": but he can scarcely expect a Court of law to rely upon his powers of observation in the diagnosis of this "disease" until he has arrived at some definite conclusion upon the invariability of its distinguishing features.

Well, "in the first place, we must know clearly what is the nature of the ground on which the law will permit an inquiry into the mental condition; what is the essential element which separates insanity from other unfavourable mental conditions, and distinguishes it from depravity, stupidity or eccentricity, from the violent excess of passion or emotion or from the natural decay of old age."³ We have it stated that "Every one is now agreed as to the

¹ Batty Tuke and Howden, *Relation of the Insanities to Criminal Responsibility*.

² Mercier, *Criminal Responsibility*, pp. 79, 80, 85, 86, 88. [ibid., p. 15.

³ *Jurid. Rev.*, Vol. XVI; Batty Tuke and Howden, *Relation of Insanities to Criminal Responsibility*, pp. 9, 10.

nature of this element; no one doubts that all the cases which are properly called insanity result from conditions of physical disease or defect; what was formerly recognised as mental disease is now known to be the effect and symptoms of physical disease caused by the physical defect or disease of the brain.”¹

It may be admitted that, granting medical authority to have substantiated this position, “the vast majority of cases present no difficulty to the skilled physician, nor is there any room for difference of opinion about them.” If the matter stood here, there might be an end of controversy between medical and legal opinion upon the subject; but there is an admitted “difficulty of discrimination in certain classes of cases” in determining the limits of insanity.² It is admitted that “cases undoubtedly do arise which are practically insoluble, in which we cannot determine with certainty whether the mental peculiarities are morbid or healthy.” But the difficulty does not end here: for “the mere proof of insanity in a given case only affords a necessary preliminary to further investigation. Insanity does not in the eye of the law destroy the conditions of responsibility and capacity.”³

Here, then, is the point at which medical and legal opinions are prone to diverge and be at variance. “The vast majority of cases,” which present no difficulty to the skilled physician, are palpably cases of brain disease or defect or decay, and there is very little if “any room for difference of opinion about them.” But there are “other classes of cases” in which morbid conditions may or may not be so marked; and we meet with still other “cases in which it is quite uncertain whether the mental phenomena are due to disease at all.”⁴

¹ *Jurid. Rev.*, Vol. XVI; Batty Tuke and Howden, *Relation of Insanities to Criminal Responsibility*, pp. 9, 10; 185, 186; 265.

² *Ibid.*, 11.

³ *Jurid. Rev.*, Vol. XVI, *Relation of Insanities to Criminal Responsibility*, p. 12.

⁴ *Ibid.*, 11, 7.

We may take it then that, in determining the limits of insanity, we meet at least with a few exceptional cases in regard to which it cannot with any assurance be said that physical disease is the essential element which separates them from other unfavourable mental conditions.¹ This being so, we are at once confronted with the question—if we do not find the differentia of these cases in physical disease, where are we to find it? Before attempting to answer the question, we must turn again to the metaphysical doctrine of the constitution of the mind with which we set out.

The endeavour has been made to describe the human mind as constituted of lower and higher faculties, corresponding generally to those of our animal and human natures respectively. By the interaction of these faculties of body and soul, in the way of experience and reason, our animal and human natures are developed; but man is likewise a spiritual being, and his human nature becomes the subject of spiritual processes. We are familiar with some of these processes in the uprisings of genius and in the illuminations of inspiration commonly associated with beneficent influences; but if there be genius for good there may also be inspiration for evil—serving maleficent ends.² We have, then, to regard the human mind as so constituted that it may be affected either by bodily and mental or by spiritual influences; and that the higher influence will rule the lower. The human personality is *possessed* by the spirit; and, according as that influence is benignant or malign, so shall we have the flight from the heights of goodness and genius or the descent into the depths of depravity and despair. In the one case there is liberty, in the other there is bondage. Sin is disease of the mind—the disease from which insanity

¹ *Jurid. Rev.*, Vol. XVI; *Relation of Insanities to Criminal Responsibility*, pp. 9, 10, 11.

² Myer, *Human Personality*, Vol. I, 56, 91, 111; Vol. II, 115, 260; Lodge, *Faith Allied with Science*, 39.

grows.¹ Insanity then is allied to genius, in this, that the one is the ascent, the other the descent of the spirit.

Here we have a clear issue: medical opinion and legal practice are at variance in determining the limits of insanity in certain classes of cases² in which it is admittedly doubtful that traces of physical disease can be found; yet medical men in the position of experts seem to base their claim to have questions of insanity treated as a subject "peculiarly their own"³ upon the ground "that all the cases which are properly called insanity" arise from conditions of physical disease. We are thrown back, therefore, upon the more ancient theory of insanity as a mental disease, in which physical disease may be an incident,⁴ in the same sense as disease may be an incident of sin and evil conduct; and we are under the necessity of finding, in these other classes of cases in which physical disease is at the least not prominent, some characteristic features which will serve to distinguish them at once from ordinary cases of indifference, negligence, or depravity.

The theory of the law, as laid down by the Judges in their answers to questions put to them by the House of Lords in 1843,⁵ makes the extreme test of responsibility (stated shortly) to be the knowledge of right and wrong. There is little reason to doubt that, in the whole class of cases which are attributable strictly to physical disease or decay, the knowledge of right and wrong may be taken to be a fairly satisfactory test of the range of responsibility; so that the medical experts, when they insist on having insanity in the aggregate treated as symptomatic of physical disease and as "properly the subject of medical study," have nothing to complain of in the legal tests as commonly

¹ Sir Oliver Lodge, *The Substance of Faith allied with Science*, 5th Ed., 53, 13, 17, 18, 28, 77, 81, 93.

² *Jurid. Rev.*, Vol. XVI, p. 11.

³ *Ibid.*, 5, 10, 7-6.

⁴ *Ibid.*, 185-6.

⁵ *McNaghten's Case* (H. L. [1843]; 10 Cl. & Fin. 200). *Jurid. Rev.*, Vol. XVI, 12, 174.

applied. But, when we come to that "large number of insane criminal acts to which exemption from punishment is not accorded by the present rule of law"¹ in respect of this knowledge test, what do we find? We find that it is not so much the understanding or intellect, but the feelings or the will that are affected: the understanding is held in a vice, the feelings and will are powerless to resist the impulse of a degenerate spirit. It is apparent at once that here, if we have come upon the limits of responsibility, the medical disease theory equally with the legal knowledge test break down. What have we to put in their place? The medical records of insanity and the legal records of criminality show the recurrence of three well-marked features which may be taken to distinguish this class of cases from the more ordinary cases of insanity, namely: (1) fixity of idea, (2) intensity of feeling, and (3) irresistible impulse—probably all more or less present, but appearing in varying degrees and affecting unequally the three primitive functions of the mind. The conditions are admirably described in the treatise from which passages have already been quoted²: "Criminal acts seem occasionally to be determined by an impulse so sudden that there is absolutely no time for realising the nature of the act and its consequences. In other cases, the act represents the crisis of an ascending movement of feeling or passion which probably in the end wholly excludes from consciousness everything but the immediate motive to action. In some cases, characterised by melancholia for instance, it seems likely enough that the crime is the result of feeling so intense in its nature that it excludes all possible considerations of the consequences of the act. In other cases, we seem to find a state resembling Somnambulism in which the mind is entirely

¹ *Jurid. Rev.*, Vol. XVI, 184, 180-7.

² *Ibid.*, *Relation of Insanities to Criminal Responsibility*, 182-187, 14, 15. Mercier, *Criminal Responsibility*, 131.

dominated by a certain chain of ideas from which it cannot escape and in other respects is entirely vacant. . . . The principle, from which Hale started on his exposition of the law, was that when there is no free choice of the will there is no crime; and that principle in various forms is too plainly the fundamental assumption of every criminal system to require discussion. But . . . the general principle passed out of sight, because it was too general and looked too philosophical for common use; the subordinate rule . . . obtained an independent existence and became the ultimate ground of appeal. What we have now to do is to go back to the general principle, and see whether there is not any change of view as to the class of cases which ought to fall under it. . . . It is this practical conception of the power of free action which forms the basis of the criminal law, and the question we have before us is one strictly of fact—whether the only effect of insanity which disables free choice and renders the subject unable to obey the law is incapacity to know the penalty which attaches to the act. . . . But there is nothing in the theory of the law to prevent other elements besides that of knowledge from being taken into consideration. If the will may be wholly overborne by insane feeling or passion, or if deliberation and control be rendered impossible by reason of weakness of faculty or by the over-mastering power of some morbid idea or impulse, the man is quite as unfree as if he were acting under physical compulsion, and there is no reason why the law should not acknowledge the fact. In reality, such cases were not taken into account simply because lawyers did not believe in their existence.”

Taking the passages which have just been quoted as being a fairly accurate description of those classes of cases which form for the most part the debateable ground between legal and medical opinion, it is manifest that here in these cases the evidence is not conspicuous either of the presence

of physical disease or of the lack of knowledge: if, then, we are to infer insanity from such cases, we must seek other tests. What we do perceive in them are symptoms of mental disturbance and lack of control; but, in these respects, they come perilously near of becoming indistinguishable from acts committed under the influence of passion or depravity. The difference between sanity and insanity is after all only one of degree, and, as has already been shown, a strictly normal condition of mind is an ideal not easily realised:¹ we have thus to reach some lower standard of practical utility which may serve to mark off the limits of responsibility.

We have already seen,² in discussing the psychological and philosophical bases of responsibility, that the human mind is not so constituted as to be wholly self-determining—that, as regards its lower faculties,³ it will naturally follow its instincts and inclinations; but that, in respect of its higher faculties, we have to seek that self-conscious unity in which responsibility has its seat. Every man is presumed to possess “that *libertas arbitrii* . . . which is the primary assumption of all theories of legal responsibility,”³ until the contrary be proved. The difficulty of proving the absence of responsibility for one's actions, in many cases that come before the Courts, is undoubtedly due to the fact that insanity seems invariably to have been taken by medical men and lawyers alike to be the result of physical disease; and, in cases where the medical expert fails to trace any symptoms of disease apart from the alleged insanity, he should not be surprised when the Court does treat his evidence with a certain amount of incredulity. If this be so, the remedy lies in a frank acknowledgment of the fact that brain disease comes in merely as an incident of insanity,

¹ *Jurid. Rev.*, Vol. XVI, 5, 11; 254, 265; 9, 17. Sully, *The Human Mind*, Vol. II, 299, 302, 310-11.

² *Law Magazine and Review*, Vol. XXXI, No. 340; 266-70.

³ *Jurid. Rev.*, Vol. XVI, 15, 262.

and that in certain varieties of cases, mental disorder apart from physical causes is all that can be shown to exist.¹

We have seen that in these difficult sorts of cases,² the symptoms of mental disorder are frequently very marked, while signs of disease or evidences of lack of knowledge (if there be any) have to be given a wide interpretation.³ We see on the other hand that, in a great majority of cases⁴ where disease is the distinguishing feature, there is no difficulty of proving insanity, either on the point of knowledge or of general incapacity. If these observations be well grounded, they seem to show that there are two distinct classes of cases which correspond to two distinct sources of origin; and that insanity may arise either from deterioration of the lower faculties on the one hand, or from disorder of the higher faculties on the other. In place, then, of the early division of insanity into mania and melancholia, or into mania, melancholia, and dementia,⁵ it is conceived that the forms of insanity may be embraced within two great classes having a natural basis in the higher and lower faculties, and which may appropriately be described as dementia and mania respectively. Dementia, which may be taken to be the deterioration or degradation of the human faculties of soul and body, is characterised mainly by the presence of bodily disease or defect and by a corresponding degradation and uncertainty of conduct;⁶ while mania, which may be taken to be distinctly the deterioration or degradation of the spiritual faculties of the mind, is characterised mainly by a corresponding affection of the lower faculties in respect of thought, feeling, and action.⁷ We have, then, to consider insanity under two aspects, either

¹ *Jurid. Rev.*, XVI, 7, 9.

² *Ibid.*, 11, 182, 183, 185. Mercier, *Criminal Responsibility*, 128, 133, 136, 139, 161, 162; 119.

³ *Jurid. Rev.*, Vol. XVI, 180-8.

⁴ *Ibid.*, 10-12.

⁵ *Ibid.*, 7. Mercier, *Criminal Responsibility*, 96, 191; 85-9.

⁶ Mercier, *Crim. Resp.*, 89-96; 96-101.

⁷ *Ibid.*, 102-152.

of which may predominate: there may be impairment of the substance of the brain—eventuating in a “denudation” of the mental faculties, in a degradation of conduct;¹ or there may be mental disturbance—eventuating in disorders of the intellect and perversions of the feelings and will.² In the one series of cases, the prevailing features are a deterioration and gradual dissolution of the mental structure; in the other series, the prevailing features are persistency, intensity, and impulsion—in the one case we have degeneration, in the other disintegration.

We may dismiss from further consideration at present that large class of cases in which no difficulty is found in determining the limits of insanity by reason of the prominence of “physical defect or disease of the brain,”³ and in which degeneration and decay of the mental faculties are marked features. In that other series of cases, in which the existence of physical disease is more or less doubtful, we want some unfailing and ready test beyond the knowledge of right and wrong⁴ by which we may draw the line for practical purposes between sanity and insanity. These cases of mental disorder present certain well-defined intellectual and emotional derangements, in which the unity of consciousness is broken up into a divided personality: the man seems to develop a double nature in which appear characteristic delusions with lack of faith lack of feeling lack of control.⁵

The negative of *libertas arbitrii* is *necessitas*: when responsibility ceases, therefore, freedom of choice has given way to

¹ Mercier, *Crim. Resp.*, 99, 114, 143. Sully, *The Human Mind*, Vol. II, 320—22.

² *Ibid.*, 112, 116, 120; 131, 134, 148. Sully, *The Human Mind*, Vol. II, 322-4.

³ *Jurid. Rev.*, Vol. XVI, 10—12.

⁴ Mercier, *Crim. Resp.*, 161-6; 180, 185; *Jurid. Rev.*, Vol. XVI, 179—188, 180, 181.

⁵ Sully, *The Human Mind*, Vol. II, 322-24; Myers, *Human Personality*, Vol. I, 36, 40, 56; Mercier, *Crim. Resp.*, 131-3, 136, 138; *Jurid. Rev.*, Vol. XVI, 17—19; Lodge, *Faith Allied with Science*, 28, 78.

necessity, and the practical outcome of this will be shown in altered mental conditions such as have been described. The prevailing feature of these states seem to be that of possession by fixed idea feeling or impulse, and they appear to thus differentiate the states of the sane from the insane by the degree of fixity or intensity with which they are accompanied.¹ In all such cases, then, the question we have to decide is whether the mind is so possessed by evil influences as to exercise an uncontrollable force upon the actions. This is plainly only a matter of degree, as there is no clear dividing line between the sane and the insane; and, as has been already shown, the limit of responsibility can be determined only upon grounds of expediency and in consideration of existing rules of law and systems of punishment.²

These considerations lead inevitably to the conclusion that there is no reason why, in the treatment of insanity, we should seek out other rules of law than those generally applied in ordinary cases. When one has come to see that cases of insanity, however various may be their phases and their complexities, may always find their counterparts in sane states, and that the differences are those of degree rather than of kind; one may well see that the ordinary rules of law are the only sure guides on questions of responsibility whether of the sane or of the insane. It is difficult to see why, in the case of the insane, knowledge of "the difference between right and wrong"³ should be held sufficient to bring the case within the limits of responsibility when, in the case of the sane, we have to consider not only the *intention* but the *will*.⁴ A man is presumed to have knowledge and

¹ *Jurid. Rev.*, Vol. XVI, 186, 181-7, 11.

² *Ibid.*, 184-6, 254, 265; Sir James Fitz-James Stephen, *General View of the Criminal Law*, 2nd ed., 81 (Ch. VI); Lodge, *Faith Allied with Science*, 53.

³ *McNaghten's Case*; Answers of the Judges, Nos. 2 and 3; *Jurid. Rev.*, Vol. XVI, 180, 254; 185.

⁴ Harris, *Principles of the Criminal Law*, Chaps. III, IV; 8th ed., 10, 12, 16, 19.

control of his actions until the contrary be shown; but, if either knowledge or power of control be proved to have been absent, he is held not to have intended or not to have willed the act with which he has been charged. The strange thing is "that, to establish a defence on the ground of insanity," a different rule of law in theory seems to prevail: that, to establish such a defence, "it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing" But, "if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."¹ It seems then that, in theory at least, the law as laid down by the Judges in 1843 will admit proof to rebut the presumption of knowledge but not that of power of control as an exculpatory plea in cases of alleged irresponsibility on the ground of insanity. Power of control is thus inferred from the possession of knowledge, which alone may be rebutted as a plea for irresponsibility, in the case of the insane; while possession of knowledge and power of control are separate presumptions, either of which may be rebutted, in the case of the sane. The presumptions of law, in determining responsibility, are equally valid for the sane and for the insane: "in the case of sane men, we admit no ground as relevant to infer irresponsibility except the absence of knowledge and criminal intention": it is only when we attempt to deal with insanity separately and by special rules that the difficulty comes in.²

This is strongly exemplified in the answers of the Judges to the questions put by the House of Lords in 1843³ when dealing with cases of what has been called "partial insanity,"

¹ *McNaghten's Case*; Answers of the Judges, Nos. 2 and 3; Harris, *Crim. Law*, Ch. IV, 16, 19.

² *Jurid. Rev.*, Vol. XVI, 185, 162; 5.

³ *McNaghten's Case*, Answers Nos. 1 and 4.

that is, the case of "persons who labour under . . . partial delusions only and are not in other respects insane." Here, it is manifest, the knowledge test does not apply except it be "in respect of one or more particular subjects or persons." In one or more of these respects, according to the hypothesis, the mind of the accused is dominated by *idées fixes* from which it cannot escape.¹ In such a state of things, it would be idle to inquire whether the accused did not know he was doing what was wrong; and the only pertinent question should be whether the fixed idea by which he was dominated did or did not control his action in respect of the particular subject or person. Here again we are confronted with the perplexity of discovering some point or line of demarcation between the actions of the insane and the offences of those actuated by mere depravity. It is true the descent from sanity into insanity may be measurable by degrees: "if we were to take the cases in a mass, we should be obliged to say that they passed imperceptibly into the normal condition of sanity;"² and, it may be said, "that there is a degree of vice so extreme that of itself it constitutes insanity."³ Even so, there is no practical guide in such cases for ascertaining the point at which the one merges into the other—where responsibility ceases and irresponsibility comes in. We have seen that, in perhaps the larger series of cases, the presence of physical disease is so marked that there can be no difficulty in attaching insanity to the actions of persons suffering therefrom; but, in that series of cases where morbid conditions may be assumed rather than proved to exist, the attribution of actual disease absolutely fails of being convincing. If we have not disease, what then have we to distinguish these misfortunes of insanity from similar misfortunes of depravity—in which we

¹ Mercier, *Crim. Resp.*, 131, 153-5, 460; Myers, *Human Personality*, Vol. I, 40-41, 51, 56, 179.

² *Jurid. Rev.*, Vol. XVI, 11.

³ Mercier, *Crim. Resp.*, 195, 203.

find an equal fixity of purpose, an equal incorrigibility, an equal resistibility to treatment? The peculiar feature of these states, which seems to mark them off from strikingly similar states of depravity, is to be observed in a cleavage of the "self"—a rupture of the personality: there is in fact possession by a power alien to the ordinary self,¹ working it. may be on a scrap of the integrate personality. The phenomena of hypnotism familiarise us with artificially induced states of split personality resembling phases of insanity: and numerous cases of multiplex personality have been recorded of so extraordinary a type as to have attracted attention.² Many of these are extreme cases in which disease, no doubt, is a conspicuous feature; but there are others of a like kind in which, beyond congenital tendency or hereditary predisposition, there seems to be nothing to indicate abnormal conditions verging upon insanity until the appearing of some action alien to the general character of the accused.³ When, then, there are signs of a duplex personality—what has been called partial insanity, in which a person may be said to labour under partial delusion only and is not in other respects insane, the appropriate question to be asked is not "Does he know?" but "Has he control?"

If these observations be well grounded, it becomes apparent that the answers of the Judges to questions I and IV of the House of Lords in 1843,⁴ are apt to be misleading. The mistake seems to have been in attempting to make special rules for the insane when the ordinary rules of law should have been followed. To the commission of a criminal act, it is necessary that there shall be knowledge and will—each of which is presumed to be present, in an

¹ Sully, *Human Mind*, Vol. II, 323, 324; Mercier, *Crim. Resp.*, 138, 139, 140; Myers, *Human Personality*, Vol. I, 40-2, 51, 56, 57, 59, 177, 179; 72, 217; 157, 169.

² *Ibid.*, Vol. I, appendices to Chap. II, 468-70, 458. *Daily Mail*, 5th April, 1905, p. 4; *Girl's ten minds*, 21st Feb., 1906, p. 8; *Dual Identity*.

³ *Jurid. Rev.*, Vol. XVI, 11, 254, 260-2.

⁴ *McNaghten's Case*.

act of itself criminal, until the contrary be proved: and in any case, therefore, absence of knowledge or absence of will,¹ if proved should result in an acquittal. If it so be that the functioning of the mind is exercised in knowing, feeling, and willing, and it be admitted that alien possession may take place, it seems likely that this rupture of the self may result in a more or less complete disorganisation of mental processes,² and that the self in the matter of will or action may lose control. In such cases the rules of the Judges, as directing attention to one phase only of mental experience, are restricting consideration to one class only out of two or perhaps three main classes into which insanity may conveniently be divided. Leaving out, then, answers I and IV, the answer of the Judges to questions II and III may be so amplified as to cover all cases, in this manner " . . . and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease [or impairment] of the mind, as not to know the nature and quality of the act he was doing; or, [as to know it but] not [to] know he was doing what was wrong; [or, that he was undergoing such a 'process of mental disorganisation']³ as to have lost the power of control of what he was doing]." ⁴

These groups of cases under the head of mania, with which we have been dealing, may be said to cover most of the debateable ground between the medical and the legal camps. They comprise for the most part cases of "possession" of "irresistible impulse" and of "moral insanity"; but with regard to the latter a distinction must be drawn. The term "moral insanity" seems to be employed to desig-

¹ Harris, *Crim. Law*, Ch. IV (8th ed., p. 16).

² Mercier, *Crim. Resp.*, 134—143, 162.

³ Sully, Vol. II, *Human Mind*, 320.

⁴ Stephen, *Digest of Criminal Law*, 4th ed., ch. III, p. 20.

nate two diverse phases of mental disorder¹—one coming more naturally under the description of dementia than of mania; the one representing the degradation, the other the submergence of moral sense; the one is a sign of depravity or decay, the other of disorganisation* or alien possession. Again, we have apparently two allied states of mental weakness or disorder in agoraphobia and claustrophobia.² They are commonly associated with an obsession of “haunting fears”; yet, in the case of agoraphobia, it would appear as if the source of the disorder may be sought in nervous shyness rather than in overpowering fear: we may then perhaps class the former among nervous the latter among mental disorders.

The general conclusion then seems to be that, while the origin of all insanity is to be looked for in unhealthy hurtful or unsound conditions, we find in one group of cases palpable evidence of the disorder through impairment of the nerve functions of the brain, but in another group of cases we have to seek evidence of the disorder in disintegration of the faculties of the mind. In the answer of the Judges to the 4th question in 1843,³ a distinction is made as between the reality or unreality of the facts with respect to which the delusion exists, and an example is given of either alternative: what the judges overlooked is that the only justification for such an act is one of necessity in pursuance of legal right; and that, under the influence of delusion, the necessity may appear equally as great under one set of circumstances as under the other. The proper question to be put under either set of circumstances is the same—was the accused person so controlled by the delusion as to be acting under necessity and not as a free agent?

¹ Mercier, *Crim. Resp.*, 128, 131, 143, 197—203, 201; 120.

² *Ibid.*, 139, 123, 143, 146, 148, 149, 151: Myers, *Human Personality*, Vol. I, 41, 177, 465, 467, 476.

³ *McNaghten's Case*. Mercier, *Crim. Resp.*, 170—172, 189. Harris, *Crim. Law*, 8th ed., 17, ch. IV.

The question now again presents itself—is there any fixed standard of responsibility? This question has already been partly answered; but as it involves the further question of punishment or retribution, a little more consideration must be given to it. Punishment must be retributive: it ought to be reformative. There is no short cut across from the paths of wrong-doing to those of righteousness. One must go back a weary way to the point whence the paths diverged and set out anew on the right road: this is atonement, regeneration—“ye must be born again.”¹ If this be so, if the only way of salvation be by way of atonement and regeneration, how insensate are our systems of condemnation and punishment for crime! Let us learn a lesson from the Great Atonement: the penalty of sin is death—it is even so by human law until the lesson of Christianity has been learnt: there was found no one in heaven or in earth who, paying the penalty of sin, could conquer sin and death but the suffering God alone. In organised society, offences against law and order were wont to carry the penalty of death, until the Christian State stepped in as saviour bearing in itself the penalty of wrongdoing and freeing the culprit when expiation has been made. That is the principle on which State punishments are meted out; but practical regenerative influences are sadly lacking.

The standard of responsibility must inevitably fluctuate according to the views which we take of the effects of punishment:² if the results of punishment be not atonement and regeneration, the tendency will be to find sources of irresponsibility in an ever-increasing number of cases. But when we perceive how infinitely various are the ways in which the mind may be affected, and how imperceptible are the steps from sanity to insanity, we must see how little

¹ *St. John's Gospel*, III, 7.

² *Jurid. Rev.*, Vol. XVI, 254, 256, 258, 260, 261-2. Mercier, *Crim. Resp.*, 151, 148, 190, 205, 206, 225.

reason there is for the wide differences in the treatment of criminals according as they may be pronounced sane or insane. Breach of law is followed by catastrophe in either case: expiation is inevitable whether the culprit be sane or insane, responsible or irresponsible; for, breach of law carries its own condemnation. But the very object of atonement is the regeneration of the offender,—the State bearing the burden of his offence that he may go back on his steps and begin anew: why should the sane criminal not have every encouragement to reformation even as the insane criminal is given every opportunity for cure? Who can say that the mental disease or moral failing is not as entitled to curative or regenerative processes in the one case as in the other?

The object of loftiest endeavour is to reach the highest type in the development of mind¹—a normal and proportional development of the several faculties. In such an endeavour alone is one truly sane. Is it true, then, “that the man of genius is for us the best type of the normal man”?² We may say, indeed, that that mind is normal, where the faculties are integrated by the spirit of the conscious self; abnormal, where disintegration has set in. The normal may be pitched high at the point of inspiration. When a nation is given over to folly, the only sane man is the prophet—the man inspired to a perception of the truth.

We have now reached the conclusion that, in the case of criminal responsibility alike with that of civil capacity, the ordinary rules of law may consistently be applied equally to the acts of the sane and of the insane.

RANKINE WILSON.

¹ Sully, *The Human Mind*, Vol. II, 299.

² Myers, *Hum. Per* Vol. I, 72.

VIII.—SPECIFICATION OF GOODS AS AFFECTING DOCUMENTS OF TITLE.

THE Scottish case of *Hayman v. M'Lintock* decided by the First Division of the Court of Session on 28th May last presents many features of interest to commercial lawyers in England as well as in Scotland. The case was in the form of a multiplepinding (interpleader) in which there were five claimants to the fund *in medio*. Ample scope was thus given to the eight counsel engaged for propounding a variety of legal pleas founded on distinct branches of the law of sale and pledge.

The facts were complicated, and require to be stated in some detail in order to form a basis for the application of legal principles.

A course of dealing had been constituted by a series of consecutive sales by an American seller to a firm of flour merchants in Glasgow, who carried on an extensive business in flour of a particular brand called "Golden Flower." The flour was sold in sacks indistinguishable from each other, but marked off from other sacks by a brand containing the special name. It was conveyed to Glasgow by the Allan line of steamers, and on arrival was occasionally delivered direct to the buyers, but was much more frequently lodged with a firm of storekeepers whose business was to a large extent associated with that of the buyers. The storekeepers had always a stock of the buyers' "Golden Flower" on hand and kept a separate store book for the transactions of these customers. Sometimes, when bills of lading were not presented to the shipowners immediately on the arrival of the steamer, the sacks were stored in the same store in the shipowners' name to await payment of freight and ships' charges, but even in these circumstances the storekeepers put the sacks into bulk along with similar sacks held by them for the primary buyers. So far as this case was

concerned the original seller was paid and there was no question of freight or ships' dues. The original buyers having become bankrupt, the trustee in their sequestration raised this multiplepounding to determine the rights of the several claimants to 1,174 sacks held in bulk by the storekeepers at the date of the bankruptcy.

The trustee himself claimed the whole flour of the brand referred to, on the ground that no property in any part of it had passed to the other claimants. Two claimants, both of whom were lenders, founded their respective claims upon bills of lading which they held in pledge. None of the bills of lading showed *ex facie* any qualification of the consignee's right to the property in the goods, but on the other hand, none of them specified the flour referred to therein except by the general brand and the quantity of sacks. In regard, however, to the latter point, it happened that in each case the shipment contained the number of sacks referred to and no more, and the goods therefore were in effect specified and "ascertained" by separation on board ship. The fact that they were afterwards wrongly inmixed by the storekeeper with other similar goods was held by the Lord Ordinary (Ardwall), and by the First Division on appeal, to have no effect on the property which had already passed to the holders of the bills of lading.

The remaining two claimants were sub-buyers, and founded their claims upon delivery orders granted either by the ship-owners in exchange for documents of title, or directly by the holders of these documents. In regard to delivery orders the usual procedure was to present them to the storekeepers who, when delivery was not immediately taken, issued in exchange, according to circumstances, other documents called respectively "transfer notes" and "store warrants." These were signed by the storekeepers themselves, and were to the effect that in their books they had transferred the goods to the holder's account, or that they had received the

goods into their store, and that they were deliverable only to the person producing the document. In regard to the documents founded on by these claimants, it could not be shown that at any period of their history they represented goods separated from a larger bulk or otherwise identified or ascertained. The Lord Ordinary and the Appellate Court held that the documents passed no property to the holders which could interfere with the general claim of the trustee in bankruptcy of the original buyers.

The judgment in both its branches seems amply justified by sect. 18 of the Sale of Goods Act 1893, which is in these terms:—"Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." If it be urged that this Act only applies to sale and not to pledge, and that it cannot be founded on by the holders of the bills of lading who were pledgees, the answer is that the result merely represents the long-established Common law of Scotland which is available to any holder of a "proprietary right" in goods (*Hamilton v. Western Bank* [1856], 19 D. 152).

The reasons above expressed sufficiently justify the judgment, but they are associated with and somewhat obscured by other propositions of a more doubtful character. Thus the Lord Ordinary goes out of his way to affirm that "transfer notes" and "store warrants" are not documents of title. This he does on the authority of the cases of *Dixon v. Bovill* ([1856], 3 Macq. 1) and *Gunn v. Bolckow* ([1875], 10 Ch. 491), but notwithstanding certain *dicta* in these cases, the true ground of judgment in each case seems to have been that the goods were not sufficiently identified or ascertained so as to permit of the document standing as their "symbol." Without such identification even a bill of lading will not pass the property. Lord M'Laren expresses an opinion to the contrary, and states the primary

distinction between a bill of lading and a delivery order to be that the former is negotiable to the effect of passing the property while the goods are at sea, although the goods are not specifically identified, while the latter has no such effect in regard to goods on shore. We hesitate to cast doubt upon any *dictum* of so eminent a commercial lawyer as Lord M'Laren; but, admittedly, his opinion on points not immediately pertinent to the judgment in the case now under notice was not a considered one and would probably have been altered on revisal. He gives no authority for the proposition, and the distinction taken by his Lordship is directly contradicted by the definition of "document of title" in the Sale of Goods Act 1893, sect. 62 (1), and in the Factors Act 1889, sect. 1 (4). The true relation of the several documents to each other is thus stated by Mr. Baron Martin in words which were afterwards expressly approved by the House of Lords: "For many years past there have been two symbols of property in goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger the former remains the only symbol of property in the goods (*Barber v. Meyerstein* [1870], 4 E. & I. App. 317, at p. 329). In the House of Lords the Lord Chancellor (Lord Hatherley), after quoting the foregoing, added: "There has been adopted for the convenience of mankind a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea, being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods and its delivery to be a delivery of them . . . As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then these symbols replace the symbol which before existed" [pp. 329, 330].

In the wide sense defined by statute, the term document of title includes equally a bill of lading, a delivery order, and a store warrant, but it is obvious that, viewed as a symbol, none of these documents can represent indeterminate goods. The practice which has arisen of using such documents to procure delivery of part of goods remaining in bulk, may form a contract personally binding on the grantor of the document, whether shipmaster or warehouseman, but it cannot confer a real right or pass any specific property. We find an instance of a personal claim founded on a bill of lading in *Grange v. Taylor* ([1904], 90 L. T. Rep. 486), but even here it resolved into a question of personal duty, and the duty being negatived the claim fell. It was not suggested in that case that any property was, or could be, passed by bills of lading which individually dealt only with a part of goods in bulk.

A strenuous effort was made in argument to show that, so far as the pledgees were concerned, the circumstances were governed by the House of Lords' judgment in the English case of *Burdick v. Sewell* ([1884], 10 App. Cas. 74). The judgment of the Court of Appeal in the case referred to (13 Q. B. D. 159) was reversed by the House of Lords, but, as it stood in the lower Court, it represented the principle set forth in the Scottish case of *Hamilton v. Western Bank* ([1856], 19 D. 152), which during more than half-a-century has been invariably followed in Scottish commercial practice. If a man takes over an *ex facie* absolute right of property in any subject, whether heritable or moveable, he acquires a real right to it which is valid against all the world, except the granter of the *ex facie* absolute document of title. The latter may have a personal right to call upon his grantee to account for the proceeds of any sale or other disposition of subjects which were only meant to be conveyed in security, but he cannot call in question any disposition of the subjects themselves made by the *ex facie*

owner whose possession has been made real. On the other hand, the grantee of the *ex facie* absolute right is subject to all the duties and responsibilities of an absolute owner. If the document of title is a conveyance of heritage, he is personally liable for taxes and disbursements of all kinds just as an unqualified owner would be; if it is a bill of lading he is personally liable for freight and ships' charges; if it is a delivery order or store warrant he is in like manner liable for warehouse rent. All this seems highly just and reasonable; but the House of Lords, in *Burdick v. Sewell*, magnified the latent personal right to call for an accounting into a real right of continued possession, and ignored the right of third parties to treat the apparent owner as the real owner. This proceeded on the highly technical and peculiarly English distinction between absolute or general property and special property. So long as the term "special property" is confined to the possession of a bailee, whose limited right is certified to the world either from the nature of his business, as that of a carrier, or from the terms of the document of title itself, the law of Scotland does not differ from that of England, but when it is proposed to extend the incidents of a limited title to those of an unqualified title, no English authority is of the slightest value in Scotland. This is admirably stated by the Lord President in the case now under notice, and is almost too clear to admit of further discussion. One may regret, for the sake of English law, that the House of Lords saw fit to overturn the judgment of the Court of Appeal in *Burdick v. Sewell*, but that is no reason for importing into established Scottish law an alien and unsatisfactory legal principle.

RICHARD BROWN.

IX.—CURRENT NOTES ON INTERNATIONAL LAW.

Ghent Resolutions of the Institute.

Thirty-three years have elapsed between the first meeting of the Institute of International Law and its twenty-first, which both took place in Ghent. Already we have briefly referred to the resolutions which were adopted on the latter occasion ; the full text of them is now accessible, and a few short comments on it will not be out of place. The shadow of the recent war hung over the assembly. The only pacific subject on which a resolution was adopted was that of Securities to Bearer. The other four resolutions related to Declaration of War, Mines, Wireless Telegraphy, and Neutrality. On the topic of Declaration, the Institute pronounced (as we intimated last November) that the law of nations, national good faith and the general interest of States, absolutely require hostilities to be preceded by an unequivocal intimation of intention. It does not say how long notice a prospective enemy must be allowed, to make his preparations in ; and its cumulative piling up of reasons of law, morality and interest, suggests that it is not very certain of its ground. It allows that an "unequivocal" ultimatum may take the place of a declaration ; but it would be very difficult to say that an ultimatum was "unequivocal," unless it was in form a declaration of war couched in conditional terms. The Institute then, having enunciated the above propositions as law, went on to recommend that they should be adopted by treaty. Last November we gave reasons for mistrusting the policy of any such system of declaration. It seems calculated to encourage irregular hostilities, under the name of "expeditions," "military operations," and the like. The Chinese delegate forcibly pointed this out at the Hague, where a similar system has received the sentimental approval of a sub-committee.

On the subject of mines, the Institute interdicts entirely and properly the laying of such destructive engines in the high seas, whether by neutrals or belligerents. In territorial waters it allows fixed mines, but not if they are likely to become detached and do damage elsewhere. Straits leading to an open sea cannot be mined at all by a neutral owner—but apparently they can by a belligerent one. It is not obvious why their position should differ from that of other territorial waters in this respect. The curious provision is annexed, that a breach of these rules entails liability on the part of the breaker of them to make reparation. That is a dangerous truism. Must we understand that an enemy whose ironclad is blown up by a mine on the high seas is entitled to compensation?—or that the laying of a fixed mine, which might, but never in fact does, become detached, will give a neutral a claim for damages if his ships are impeded by its existence? It is observed that the neutral, as well as the belligerent, must make some kind of notification: what kind, how limited and how effected, is left absolutely vague. It might, for example, be sufficient to issue a general warning that all the waters of a particular State are dangerous on account of mines. The whole subject is now under discussion at the Hague: the main divergence of view being as to the advisability of allowing belligerents to sow mines broadcast in “the theatre of war”—that is, to turn part of the high seas into a gladiatorial arena.

Wireless Telegraphy.

The Institute here lays down the general principle that the air is free. This is not very consistent with the English rule of law that the proprietor of land is owner *usque ad coelum*. It may be none the worse for that, but such a wide proposition was neither necessary nor desirable in relation to wireless telegraphy, which is not

transmitted through the air, but through the luminiferous ether. It is, moreover, one of those general propositions which may mean a great deal or nothing, owing to the reservation to the territorial Power of all rights necessary for its safety and welfare (*conservation*). Descending to particulars, the State is only allowed to stop Hertzian waves in so far as may be needful for its safety, unless we can spell out an implied permission to stop them on other grounds in war-time, from the fact that it is declared not to be their duty to do so. A belligerent is greatly favoured. He may, not only on his own ground but on the high seas, interfere with the despatch of wireless messages of all kinds, innocent or hostile, within the elastic "sphere of his military operations." Curiously, he is given no power to break up messages. And as no restrictions are placed upon his powers, it would seem that he could board a neutral vessel and throw her telegraphic machinery into the sea.

These excessive powers cannot be too strongly and promptly deprecated. The indefinite area of their exercise, and the unlimited powers of interference conferred on belligerents cruising on the high seas, are utterly and reprehensibly retrograde provisions. The world, which regards the modern belligerent as a nuisance, is not likely to permit itself to be virtually excluded from any tract of ocean for his convenience. But this is not the only point in which the rules favour belligerents. A neutral is to take over or shut up all stations belonging to belligerents on its territory (it might as well shut up their consulates). Wireless telegraphists who operate communications between various parts of a hostile territory can be regarded as prisoners of war; and, if they endeavour to carry the despatch to its destination clandestinely, as spies! Sufficient has been said to show the hopelessly antiquated character of these rules, which appear to be supported by the authority of M. de Fauchille, the *rapporteur*.

Bearer Bonds.

An interesting discussion arose in the Institute on this technical matter. France, and many other Latin nations, allow the owner to retain the right of reclaiming lost or stolen bonds from innocent holders for value. Conflicts accordingly arise, which cannot be avoided, but of which it is desirable to find a uniform solution. Mr. Asser proposed to select the law of the place where the bond is situated—*lex loci rei sitæ*; thus assimilating these contracts to movable property. Mr. A. Rolin preferred that of the country where the debtor who issued the bond is established. A younger school, of which Mr. Thaller (Paris) was the spokesman, wished to affix to a bond a kind of indelible personal law of its own—that of the country in which it was issued. The Institute had no difficulty in determining that, as between the issuing debtor and the dispossessed owner, the law of the country where the former is established should apply. Mr. Striet pointed out the inconsistency of proceeding to make different regulations prevail as between the dispossessed owner and the innocent holder: this objection was answered, but not convincingly, by Mr. Lyon-Caen, and the Institute decided that when once a bond has been negotiated in a particular country, the rights of claimants to it *inter se* should be regulated by the law of that place so far as the possibility of reclaiming the bond is concerned. Mr. Lainé defended this on the ground, now refreshingly unfamiliar—of the authority of the territorial sovereign over all acts done in his realm. But the authority of the territorial sovereign within whose realm the bond actually lies at the time of suit is at least as much entitled to consideration. And his authority is expressly excluded by the closing words of the resolution as adopted; although Mr. A. Rolin nearly succeeded in making it unnecessary for the tribunal to relieve dispossessed owners against its own principles. His amendment was only rejected by five to five.

It is not quite apparent what is to happen when the bond has been negotiated twice. Is it thenceforward to be subject to the law of the last *régime*? Moreover, must the "negotiation," which changes the law applicable, be a valid negotiation? For instance, is a negotiation in France by the thief himself to confer rights on subsequent innocent holders? Or must there have been a valid and regular negotiation in France before the instrument is struck by French law? A more serious question still is opened up by the awkward way in which this single provision is picked out of the law of the country of negotiation, and made applicable to a document which is otherwise subject to another law. How far does this single provision carry in its train fragments of the legal system of which it forms an integral part?

Moulis v. Owen.

In reversing the decision of Darling, J., in this case, the Court of Appeal appears to have overlooked two vital points in which it differs from *Robinson v. Bland* ([1760], Burr. 1078; W. Bl., 234, 256), the case upon which they so strongly relied. These are, that in *Robinson v. Bland* both parties to the foreign contract were obviously English, which they were not in *Moulis v. Owen*; and that in the former case, Lord Mansfield, while certainly expressing his opinion that the law decisive of the validity of a bill is the law of the place where it is made payable, also expressly stated that it was not necessary to consider the point. His *obiter dictum*, apparently concurred in by his puisnes, was accepted by the Court of Appeal as a binding decision, and as superior in authority to the actual judgment of so eminent a commercial judge as Willes, J., after consultation with his colleagues; but it is respectfully submitted that it is nothing of the kind. Superficially, the earlier case presents a great resemblance to the present one;

both were instances of a bill of exchange given for money lost at gaming. But the resemblance is superficial only. In *Robinson v. Bland* (*ut supra*) the laws of France and of England alike refused a remedy on the bill to the plaintiff. Lord Mansfield said—"The facts stated scarce leave room for any question: because the law of France and of England is the same." It was asserted in argument that, even if the bill were bad, the consideration *au fond* for the bill was good in France; since the Court of Honour would compel the payment of such debts. But Lord Mansfield observes that the Marshals of France (the judges of the Court of Honour) would never have interfered in such a case, their jurisdiction being purely personal and directed to preventing duelling. "As for the Court of Honour, it is no part of the law of the land. No Court of justice will aid it. The Parliament of Paris will take no cognizance of it. It is like the arbitrary jurisdictions set up here"—proceeds his lordship, disrespectfully—"at horse-races and cock-pits; or (as has been observed at the Bar) like the Courts-martial in England, which are to decide what is, or is not, behaving like a gentleman. If a cause really comes before them, well: if not, no Court of law will adopt their rules of decision Therefore, as to the money won, the contract is to be considered as void by the law of France, as well as by the law of England:—*which makes it unnecessary to consider* 'how far the law of France ought to be regarded.'" As to the money lent, the Court came to a similar conclusion, that the law of both countries was the same, and in this case they allowed the lender a remedy. Of course, this was prior to the English legislation which deprived persons who lent money for gambling purposes of all remedy for its recovery.

It is abundantly clear, therefore, that the assumed similarity of the English and French law was held to absolve the Court from determining with precision the question of which

law was applicable. The opinions which are expressed as to the parties "looking to the law of England" as governing the transaction, are not necessary to the decision, and are obviously bound up with the particular facts of the case.

Enough has probably been said to demonstrate the impropriety of relying on expressions delivered *obiter* in a case which turned upon the transactions of two Englishmen in Paris, as establishing any general principle available against an Algerian who lends an Englishman cash in Algiers. It is almost certain that Robinson was English; Lord Mansfield (1 W. Bl. 259) says that perhaps he lent the money "to pay foreigners' money won, and thereby to extricate the deceased (Sir J. Bland) from the clutches of the Court of Honour." In *King v. Kemp* ([1863], 8 L. T., 255) Willes, J., after consulting the other judges, held that, where money was said to have been lent in France to pay a gaming debt, the invalidity in France of such a loan would be no defence to an action on a bill for the amount, even if substantiated. Lord Collins seems to consider that the report of this case is virtually worthless. He criticises it as representing Mr. Justice Willes either as consulting his colleagues as to what the French law was, or as to the proper decision on a point already concluded by *Robinson v. Bland*. Clearly Mr. Justice Willes did not consult them as to the French law—he took their opinion on the point on which he says they agreed with him, namely, whether the possible invalidity of the consideration by French law could have any effect on the validity of the bill. And we have already seen that *Robinson v. Bland* is by no means conclusive on this. Also Lord Collins criticises the report as inaccurate, in stating that the present Lord Justice R. V. Williams was "then" at the Bar, *i.e.*, in May, 1863. Very respectfully it may be pointed out that the report says "April 25th," not "May": and that the present Lord Justice is not the only member of his dis-

tinguished family whose initial is "R." In the *Law List* for 1863 appears the name of "R. Vaughan Williams, esqre. sp. pl., North Wāles and Chester Circ."—he was then of fifteen years' standing, and was no doubt Sir R. P. Collier's junior in the case. It is to be regretted that the whole Court considered the *dicta* in *Robinson v. Bland* conclusive as to the law to be applied, and discarded the law of Algiers. Moulton, L.J., thought, however, with Darling, J., that the law of England did not strike at foreign gaming, and pertinently inquired what "parish" was to get the benefit of the penalties imposed by the earlier Gaming Acts. Collins, M.R., and Cozens-Hardy, L.J., still oppressed by a spectral *Robinson v. Bland* of gigantic dimensions, felt bound to decide that English law did include in its beneficent orbit the go-bang of the Chinaman and the euchre of California.

Domicile and Nationality.

Mr. Asser has contributed to the *Annuaire* of the Institute a discussion of the possibility of reconciling the two *criteria* of Private law—nationality and domicile. Greatly impressed by the brilliant work of Dr. Zeballos, the capable and learned Foreign Secretary of the Argentine, he has come to recognise that the general acceptance of nationality as the proper criterion by Continental nations is not a convincing reason why Argentina, Britain and the United States should abandon their adhesion to the principle of domicile. Yet, as the Hague Private Law Conventions pivot on the recognition of nationality as the criterion, Mr. Asser sees that, without some compromise, those beneficent conventions can never become general. His eirenicon is very simple: it is virtually to accept as the criterion mere residence, and to style it "nationality." He proposes to distinguish between nationality in public matters and nationality in private matters. The latter would be the criterion of Private law; and it would actually fall far

short of our idea of domicile. It has long been apparent that Continental thinkers cannot but confuse the British conception of "domicile" with their own *domicile*, which amounts to little more than "residence." In effect, Mr. Asser proposes to adopt a term of six years' residence as conferring "Private law" nationality. This he appears to think a great concession to the States which at present adopt the principle of domicile. In fact, it is to go a great deal further than they do. In very few cases indeed would six years' residence abroad, without more, be held in England to constitute a foreign domicile.

It is incorporation with the foreign population by making one's settled residence among them, that constitutes the criterion of Private law in the English sense. Nothing more reasonable can be imagined. The political bonds of nationality do not reach to the heart of the family or to the intercourse of daily life between neighbours and customers. Indeed, such a settled residence as this creates nationality in Italy, if we mistake not. And it is on these lines that the divergence is to be reconciled. On the one hand, nationality is conceded to, or imposed upon, the attached settler. On the other, nationality is held to govern his private relations. We thus reach the old position that it is settled attachment that determines the Private law position of each individual.

Hague Conference.

The long-expected Peace Conference is now in full session. Our readers will readily forgive us if we say that it seems best to await the outcome of its deliberations before dealing with them in detail. If anything is apparent from the discussions so far as they have gone, it is that the Conference is much too unwieldy a body to be of real

use. If each country had sent one representative plenipotentiary, the assembly of thirty or forty would have been a workable chamber. It is to be hoped that on future occasions the Conference will be so limited in numbers as to be a real means of interchange of thought between the various nations. Each independent State represents an idea; and ideas are not measurable in terms of population and area.

That consideration, again, makes one distrustful of the alleged British project to give the decision of Prize Cases to nominees of Powers possessing over 800,000 tons of shipping. This would be absolutely unfair to the smaller States. In some form, however, it seems likely that International Prize Courts will be an outcome of the present meeting. In a paper read before the International Law Association, in 1905, Dr. Pawley Bate forcibly urged the necessity that Prize law should first be codified: otherwise, high questions of policy will be left to the determination of Courts of law—the new Prize Courts. This consideration does not seem to have troubled the framers of the German or British projects now under discussion at the Hague (though the Japanese delegate laid stress on it). Possibly they anticipate the immediate settlement by the present Conference of all outstanding thorny problems of Prize law. And, after all, it must not be forgotten that it is to lawyers (such as Story, Portalis, Grant and Scott) that the present law owes its development.

If it is a fact that the British delegation has expressed its readiness to cut the Gordian knots of contraband by abolishing that institution altogether, they can only be congratulated on adopting a counsel of remarkable good sense. The limitations of contraband have got into a considerable tangle, and it has long seemed to us, respectfully following von Bar, that by far the best method of dealing with the matter is the heroic one. Let contending nations, if they

fight at all, fight to a finish with the best arms they can get. This will make it less necessary to arm to the teeth in time of peace, and it will thus tend to relieve that crushing burden. It will encourage neutrality. It will immensely reduce the friction between belligerents and neutrals. After the demonstration afforded by the Russian war of the fact that a belligerent will stick at nothing to sweep into his net, if he can, such innocent articles as cotton and railway sleepers, it is probable that the doctrine of "occasional" contraband will soon be a thing of the past. It is difficult to find any satisfactory test by which to judge of its contraband character in any given case. The old test of destination to a port of naval or military equipment, or its immediate neighbourhood, is difficult of application in these days of steam. The *Calchas* case shows that some more or less plausible possibility of military use can always be set up by the captor, if that established test is abandoned. The alternative seems to be the abolition of occasional contraband altogether. An innocent cargo was, in any case, not the subject of confiscation, but only of purchase, and its exemption from purchase need be regretted by no one. The belligerent can always offer the neutral master inducements sufficient to make him break his contract with the enemy, and sell the goods to himself. The disappearance of "occasional" contraband will be an immense gain, but the entire abolition of contraband seizure is the ideal. It is an institute of the old unregulated days of self-help, redolent of irregular war, reprisals and buccaneering. It is quite unsuited to the present age of organised commerce.

The German proposal to allow the confiscation of "occasional" contraband if (1) addressed to enemy governments or contractors, (2) despatched to a fortified place in enemy territory, or to a place used by the enemy as a base, goes far beyond the British practice of pre-emption, and should by no means be accepted without question. But the tests

proposed are excellent, if the result be limited to pre-emption. The "place used as a base" must be in the enemy's territory or control, since it is provided that the ship must be directly making for such a port. It may also be directly making for the enemy's armed forces—which, plainly, it can only directly meet at sea or in harbour. These qualifications, while maintaining the genuine doctrine of *The Commercen*, exclude the vast superstructure erected upon it by such writers as Calvo, who allowed contraband to be seized *en route* to a neutral port on suspicion of an indirect destination to the enemy.

Capture.

In *Andersen v. Marten* (L. R. [1907], 2 K. B. 248), the point was for the first time decided, in an English Court, that condemnation of a vessel in a prize Court relates back to the time of capture. It is easy to see this in relation to enemy ships and goods: for they lie open to capture, and the subsequent condemnation only regularises it. It is less obvious in the case of neutral ships. They are confiscable only in special eventualities; and it might plausibly be argued that the decree must intervene before even an inchoate property passes. In the present case it was, perhaps rightly, otherwise held, though the distinction between a neutral and a hostile ship does not seem to have been adverted to. The German owner of the vessel (the *Regulus*) insured his disbursements on her, with an exception of "capture." She was laden by him with coal which he was under contract to deliver in Vladivostock; consequently, (admitting that coal is contraband) she was liable to capture by the Japanese, as the property of the owner of the contraband cargo. They in fact captured her on February 26, 1905; and on the 27th she stranded and became a wreck. A decree of condemnation was passed in the Yosokusa prize Court in the following May. The owner then sued the insurers in

England; and they relied on the exception in the policy. Had the ship then, when she stranded, been already "lost" by capture? The Court (Channell, J.) held that she had, since the capture, though of itself it transmuted no property, put the captors in a situation to deprive the owners of it by obtaining a regular decree. It is a little difficult to appreciate the reasoning which makes the rights of an insured vary according as a third party (the captor) thinks it worth while to proceed to condemnation or not: and the doctrine is obviously capable of much abuse. In Lord Young's words, "It may be right for all that."

T. BATY.

X.—NOTES ON RECENT CASES (ENGLISH).

THE eventful career of *Villar v. Gilbey* has now come to an end. That case turned upon the meaning of the phrase children "born" at a certain time. Swinfen Eady, J. (L. R. [1905], 2 Ch. 301), held that this expression *primâ facie* meant children then actually brought forth, and included children then *en ventre sa mère* only when it was for the benefit of such children to be included. The Court of Appeal (L. R. [1906], 1 Ch. 583), reversed this, and held that in every case, unless the context was to the contrary effect, the phrase must be taken to include children *en ventre sa mère*. Now (L. R. [1907], A. C. 139), the House of Lords have unanimously reversed the Court of Appeal, and restored the decision of Swinfen Eady, J.

Hard on the top of this decision comes that of Kekewich, J., in *In re Salaman* (L. R. [1907], 2 Ch. 46). There a testator left gifts to his grand-nephews and grand-nieces "born" before the date of his will. Here it was held that a child *en ventre sa mère* was not included, although, of course, it would have been for such child's benefit to hold

that he was. The Court was of opinion that the testator meant to make gifts only to the grand-nephews and grand-nieces whom he knew, or at any rate knew to be living, at the time he made his will. So now the phrase must be read as including children *en ventre sa mère* at the time fixed only when it is for the benefit of such children that they should be included, and when the time fixed is a future time.

The conclusion that these two cases, and many others like them, suggest, is that it is a pity considerations as to the donee's benefit should ever have been allowed to influence the construction of documents. It is often very hard to say what is for the donee's benefit, and it is usually the case that what is for his benefit is to the detriment of some other equally worthy person, and it is always a cause of confusion and litigation to twist, from any motive, words from their natural meaning. One cannot help thinking that in both the above cases the testator's intention was defeated owing to the draftsman of the will assuming that the Court would, if necessary, interpret children "born" to include children *en ventre sa mère*.

In *In re Dover Coalfields Extension Limited* (L. R. [1907], 2 Ch. 76), Warrington, J., held that where A company holds shares in B company, and a director of A company is appointed a director of B company in order to look after the interests of A company, the fees such director receives for his services to B company are not held in trust by him for A company. This seems good law and good sense, since those fees are paid to the director for his services to B company, and not for his qualification, which is all that is provided by A company. But, strange to say, only two years ago the very same point turned up in *In re Francis* (74 L. J., Ch. 198), and was decided in the very opposite sense. There trustees of shares were appointed

directors of the company of whose shares they were trustees, and it seems to have been assumed on all hands that for the fees they received as directors they had to account to the trust estate. At any rate, the only argument reported is as to whether such fees were to be held capital or income, and Kekewich, J., in his judgment, at page 198, says: "It is clear that as regards these moneys they are accountable to the trust estate, there being no provision in the will which enables them to retain the money for their own use and benefit."

In *Corsellis v. London County Council* (L. R. [1907], 1 Ch. 704), it has been decided that a leaseholder cannot without the consent of the freeholder dedicate to the public part of the land leased even for the period of his lease. No such thing as dedication for a term is known to the Common law; it must be absolute. The same rule applied at Common law to the acquisition of easements by prescription. But owing to the wording of sect. 3 of the Prescription Act, 1832, a leaseholder can acquire, or suffer to be acquired, an indefeasible easement of light against his lessor. (*Fear v. Morgan*, L. R. [1906], 2 Ch. 406; and see *Law Magazine*, Feb. 1907, p. 218.)

The case of *Ankerson v. Connelly* (L. R. [1907], 1 Ch. 678), which, as decided in the Court below, altered the law as to ancient lights, as generally understood, in a remarkable manner (see *Law Magazine*, Feb. 1907, p. 217), has been dealt with in the Court of Appeal on a very narrow issue. The Court below held that where an owner of an ancient light increased the burden of the easement indefinitely by building up his own windows lighting the room served by it, he lost the easement. The Court of Appeal affirmed the decision on the ground that if the owner had not built up the other windows, the obstruction of the ancient light

would not have materially damaged the lighting of the room. Both decisions are based on the law as laid down in *Colls v. Home & Colonial Stores* (L. R. [1904], A. C. 179), but the ground on which the Court of Appeal proceeded seems the surer.

It is satisfactory that the Court of Appeal has affirmed the decision of Kekewich, J., in *In re Fude's Musical Compositions* (L. R. [1907], 1 Ch. 651), though the decision turns merely on the interpretation of a particular agreement. Too often authors part with the copyright in their works for a mere royalty to be paid on the copies sold by the purchaser. The result is to place the author at the mercy of the publisher. The latter may spoil the author's market by refusing to take proceedings to restrain piracy, or he may assign the copyright to another publisher, who will take it discharged of all obligations as to royalty, form of publication, &c., and on his bankruptcy it will vest in the trustee in bankruptcy, who will sell it free from these obligations. Authors should remember that when they part with the copyright their work becomes the property of the publisher, and any agreement he makes with them as to what is to be done with it binds himself alone. When the author is paid by a royalty, or where he wishes to retain control over the publication of the work, he should retain the copyright and merely agree with the publisher terms for his work's publication.

Howatson v. Webb (L. R. [1907], 1 Ch. 537) is a warning to those people who sign legal papers which they know relate to property on a mere representation as to their contents without taking the trouble of reading them. There a speculative solicitor was accustomed to take building leases in the name of his managing clerk, who had no pecuniary interest in his transactions. Once the solicitor asked his clerk to execute a deed. The clerk asked what

the deed was? The solicitor said it was a transfer of some of the leaseholds held in the clerk's name. The clerk executed it. Subsequently it turned out to be a mortgage of these leaseholds, the clerk being the mortgagor and the deed containing the usual covenant to repay the mortgage debt. When the mortgagee sued on this covenant the clerk pleaded *non factum est*, alleging his execution had been obtained by misrepresentation. But the plea failed. A misrepresentation, to be a defence, must not be merely as to the contents, but as to the whole character of the instrument.

J. A. S.

The opening statement of Channell, J., in *Oppenheimer v. Frazer & Wyatt and another*, briefly noted in our issue of May last (Vol. XXXII.—No. 344) that the case "raises very interesting questions under the Factors Act 1889" is assuredly true; and though his decision has not been confirmed by the Court of Appeal (L. R. [1907], 2 K. B. 50), the reversal detracts nothing from the interest which he predicted. His view seems to be that, if a mercantile agent is in the terms of sect. 2, sub-sect. (1) of the Act, in "possession" of goods with the consent of the owner, the agent can, even though he has obtained them through larceny by a trick, make a valid sale of the stolen goods to a *bonâ fide* purchaser. "Consent" must, in order to insure such a power, be of course interpreted in a wider sense than the law has hitherto given to it. And the judgment of the Court of Appeal is in accordance with the law as at present declared. But in support of Mr. Justice Channell's view several points may be suggested. At Common law, with exceptions not applicable to this case, an innocent purchaser of stolen goods acquires no right to them because the thief had in them no property, though he had possession. But a mercantile agent seldom has more than possession. And the Factors Act was in-

tended, in the interests of commerce, to protect a purchase negotiated by a mercantile agent. The decided cases show that a sale by such an agent is valid even though the consent of the owner to his possession was obtained by any fraud short of larceny by a trick. But it is often difficult to discriminate between such a form of larceny and the obtaining of goods by false pretences. As the terms of the section are confined to "possession" with the consent of the owner, it seems to be an inference of the learned Judge that the Legislature meant to include all means by which possession was assented to by the owner. If the case should go up to the House of Lords, it will be watched with an additional interest, for Channell, J., expressed his belief that if it came up for review, Collins, M.R., would explain that the terms of his judgment in *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (L. R. [1899], 1 Q. B. 643), from which an inference contrary to the view of Channell, J., had been drawn, were merely intended to protect him from giving a decision upon a point that was not before him. As Collins, then M.R., is now Lord Collins, it is almost sure that he would take part in a decision on this case in the Lords.

Another case of larceny by fraud, but in this instance by a bailee, is that of *Leicester and Co. v. Cherryman* (L. R. [1907], 2 K. B. 101; 76 L. J. R., K. B. 711). If goods appropriated by such means are pawned, it is an advantage to the pawnbroker that, after the conviction of the thief, an order for the restitution of the stolen property should be made, under sect. 30 sub-sect. 2 of the Pawnbrokers Act, because before the order can be enforced repayment must be made to the pawnbroker of the amount, or any portion of it that the Court may direct, which he has advanced on the goods. In this instance the police officer who was in charge of the case made an application for a restitution order. The plaintiff

instead of availing himself of the order sued for the return of the goods; but was met by the plea that the matter was *res judicata*, and that he was estopped because the application for and the granting of the order were made in his presence. But the Court held that the civil rights of the owner were left unimpaired by the Act, and were of opinion that even if the plaintiff himself had applied for and obtained the order, he could still have refrained from enforcing it and have pursued his civil remedy instead.

With the judgment in *Starkey v. Bank of England* (L. R. [1903], A. C. 114) as a precedent, the decision in *Bank of England v. Cutler* (L. R. [1907], 1 K. B. 889) could hardly have been different. For if a broker, believing himself to be acting for the real stockholder, was held liable to indemnify the Bank for a transfer of stock which he innocently procured on a forged power of attorney, not less can be the liability of a broker who attends at the Bank to identify, in perfect good faith but apparently on a quite casual introduction, as the real stockholder an individual who personates him and forges his signature, and by that identification induces the Bank to transfer stock. The case is a stronger one than *Sheffield Corporation v. Barclay* (noted in Vol. XXIX, No. 331, p. 227), which has not been fortunate enough to achieve universal approval.

In *Harse v. Pearl Life Insurance Company*, which was noted in our issue for August, 1904 (Vol. XXIX, No. 333), it was unfortunately held by the Court of Appeal, reversing the judgment of the Divisional Court, that the defendant company was not bound by the false statement of its agent that a non-insurable interest was an insurable one, and, as a consequence, that premiums paid in reliance on the agent's statement could not be recovered. A doubt may be ventured with great respect whether the decision is quite

unimpeachable. At any rate, in *Kettlewell v. Refuge Insurance Co.* (L. R. [1907], 2 K. B. 242; 76 L. J. R., K. B. 711), the Court have happily sustained the judgment of the learned County Court judge, and ordered the return of premiums paid by the plaintiff after she was induced by two agents of the defendant company to continue for a further period of four years a policy which she wished to abandon, on the promise of the agents, though the authority of the agents to make the promise was repudiated by their employers, that at the end of that time a free policy for the amount insured would be issued without further payment. The defendant company contended that the plaintiff could not recover the four years' premiums as there had not been a total failure of consideration, inasmuch as the company could have been called on to pay the capital sum of the policy if the death of the assured person had happened within the period which the premiums covered. But the Court held that the policy had never attached, and therefore that the company could not retain money which they had acquired by the fraud of their agents.

By sect. 58 of the Sale of Goods Act 1893 a sale by auction may (sub-sect. 4) "be notified to be subject to reserve"; and by sub-sect. 2 a sale "is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner." But in *M'Manus v. Fortescue* (L. R. [1907], 2 K. B. 1; 76 L. J. R., K. B. 393, the Court have held that the section is not quite so decisive as it reads, for in an auction with notice of reserve every offer by the auctioneer and every bid, including the final, and its acceptance indicated by the fall of the hammer, is conditional on the final bid being equal to or higher than the reserve, because, as the auctioneer is an agent for a special purpose, his employer may restrict the authority given to him. This is a variation of some consequence in

the accepted law relating to auctioneers, and it is hardly reconcilable with *Rainbow v. Hawkins* (L. R. [1904], 2 K. B. 522).

Fur and feather stir the hunting instincts of a dog, and it is perhaps natural to him when he has not enjoyed the advantage of a good education to run at a fowl. It is certainly natural for a fowl to escape from dismemberment. Blinded by fear a hen, pursued by a passing cur, flew between the spokes of a bicycle ridden along the highway, and the rider was upset to his injury. But as it is not within the ordinary domestic habits of barn-door poultry to fly at passing vehicles, and as there was no negligence on the part of the fowl-keeper, the Court refused any remedy to the plaintiff in *Hadwell v. Righton* (L. R. [1907], 2 K. B. 345).

A vote recorded under the Ballot Act 1872 is not lost merely by the voter not placing his cross within the ruled space provided in the form, the pattern of which is supplied in Schedule 2 of the Act. The Act is complied with if the cross is put opposite to the name of the candidate for whom the vote is given. This was decided in the *Pontardawe Rural Council Election Petition* (L. R. [1907], 2 K. B. 313; 76 L. J. R., K. B. 702).

T. J. B.

IRISH CASES.

Brandon v. Hanna ([1907], 2 Ir. R. 2f2), although turning largely upon facts, is a case likely to be useful upon a branch of law not very rich in authorities—the question whether an agent for sale is entitled to commission in respect of a transaction arising only indirectly from his action. The defendant was the proprietrix of a drapery business, and the plaintiffs a firm of accountants who had

been employed to audit her accounts. In June, 1904, she thought of retiring, and asked the plaintiffs' representative what his firm would charge for finding a purchaser of her business and carrying out a sale: he named a per-centage on the price, and it was agreed that the terms should be "no sale, no charge." In October following, he named a firm called Newells as possible purchasers, and brought one of them to look at defendant's premises, but nothing came of this visit, although some negotiations continued up till February, 1905. After that month nothing further was done by the plaintiffs in relation to a sale. In the following June, she paid the plaintiffs some small expenses incurred in connection with the proposed sale. Shortly after this, the defendant again mentioned to a person called Carlisle, not connected with the plaintiffs, her desire to sell, and he, curiously enough, also suggested the Newells as possible buyers: he communicated with the Newells who again inspected the premises, and this time they did purchase. Thereupon the plaintiffs sued for commission on this sale; and the jury, to the surprise of the judge who tried the case, found that the sale did really and substantially proceed from the plaintiffs' acts.

This verdict was set aside by the Court of Appeal, in accordance with apparent common-sense, on the ground that there was no evidence to support it. The law is shortly and usefully summarized by Holmes, L.J.:—"In every case where an agent employed to sell sues for commission on the purchase-money, he must, before he can succeed, establish that the sale was brought about by him. The mere introduction of the person who ultimately becomes the purchaser is not enough, unless it appears that the introduction has led to the purchase. I am of opinion that the admitted facts show clearly that what was done by the plaintiffs had no connexion, direct or indirect, with the sale, and that therefore there was no evidence to support the

finding." One might prefer to say that, although the Newells might have been to some extent indirectly influenced towards the purchase by the plaintiffs' original introduction, still the lapse of time and the breaking off of negotiations showed that there was no *direct* connexion between the two.

M'Neill v. Millen ([1907] 2 Ir. R. 328), is an interesting little case, in which all the members of the Divisional Court and the Court of Appeal seem to have been clear that the plaintiff was entitled to a remedy on the facts, though they differed as to the precise legal ground on which it should be put. The plaintiff had delivered his motor-car to the defendants, to be repaired by them. He told them that he intended to insure the car while on their premises, whereupon they represented to the plaintiff that they had insured the car for him, and he therefore refrained from taking out an insurance. As a matter of fact the car was not insured; the defendants had effected a policy on certain cars on their premises, but it afterwards turned out that this did not include the plaintiff's car. Fraud in the representation was not found; it appeared to have been made under a mistake; but the jury found that the representation was made "negligently and without due and proper care." The car having been destroyed by fire, it was held that the plaintiff was entitled to damages. Lord O'Brien, C. J., put his judgment on the ground of estoppel, as did Madden, J.; but the Court of Appeal preferred to rest their decision upon contract. "As between bailor and bailee the relation is contractual; one party stating to the other the terms of the contract, must be taken to do so with reasonable care. That the statement was made without reasonable care, or without foundation in fact, cannot do away with its effect as between the parties, nor can there be absence of consideration when the statement was acted upon by the bailor." This gets

over the difficulty about making an estoppel a cause of action.

The application of the rule against perpetuities is curiously exemplified by *Tyrrell's Estate* ([1907], 1 Ir. R. 292). A grant of fee-simple lands was made on trust to pay an annuity to a specified person for life, and subject thereto, to pay £90 per annum out of the rents of the said lands for the support of the Protestant religion in a certain parish. Then followed a proviso: "that the person or persons for the time being beneficially interested in the said estates, as the representative or representatives of the said annuitant shall, if he or they shall so think fit, in lieu of the said £90, pay the interest payable on eighteen Russian Imperial or railway bonds for £100 each to and for the aforesaid purpose." The lands in question having been sold to tenants under the Land Purchase Acts, the question as to the validity of this proviso was raised. The Court of Appeal held it was void under the rule against perpetuities, and decided that the rent-charge of £90 a-year could not be redeemed by assigning the bonds in lieu of the rent-charge. The test for the validity of the proviso was, whether its exercise would give an interest in the land? The Court could not distinguish it from the option of purchase in *Lond. & S. W. Ry. Co. v. Gomm* (20 Ch. D. 562): and there could be no doubt that if it did create such an equitable interest, then, as no time was limited for its exercise, it must fail for remoteness.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Principles of English Law. By R. CAMPBELL, M.A. London: Stevens & Sons. 1907.

In these days, when there is a tendency to found all decisions almost exclusively upon Case law, a book such as the one under review is of the greatest possible use. In it are given, in a modern and up-to-date form, the great fundamental principles, innate or borrowed from the Romans, which underlie the English system of Jurisprudence. Avowedly based upon Blackstone's *Commentaries*, the Author has sought to trace the changes which have occurred since that great writer's time. Apparently Mr. Campbell has had the assistance of many of the leading modern authorities on the theory of our law, and such names as Professor T. E. Holland and Professor Vinogradoff are a sufficient guarantee of the profundity of his researches. The book is divided into five Parts. Part I deals with the status of the individual both public and private. In Part II we have that important subject dealt with, namely, the ownership of Property. Obligations or contractual relationship form the subject-matter of Part III. In Part IV Civil Procedure is treated of, and Part V deals with Crimes and Criminal Procedure. All these varying subjects are disposed of in a manner which displays ripe scholarship and a legal mind of unusual acumen and penetration. Mr. Campbell, like great Homer, occasionally nods, and one pre-eminent occasion must have been when writing page 406. Surely it is a confusion of ideas to say: "By the Roman law, *nudum pactum* was a promise unaccompanied by any legal solemnity, and not supported by '*causa*.'" An absence of "*causa*," in one of its forms, is an absence of any legal solemnity, *i.e.*, one of the recognised branches of *causa* is the presence of such solemnity as made the agreement actionable according to Roman law. *Pollock on Contracts* implies this; Mr. Justice Kotze is explicit in the note on page 28, Vol. II, of his translation of Van Leeuwen's *Roman-Dutch Law*, and Sir James Rose-Innes is illuminating on this point in his well-reasoned judgment in the case of *Rood v. Wallach* ([1904], Transvaal Supreme Court Reports, p. 187). These are, however, minor criticisms after all, to a work of all-round excellence, which may be commended, not only to the student, but also to the fully-qualified lawyer. In conclusion one may state that the Index is a safe and a sure guide to the contents of the book.

His Grace the Steward and Trial of Peers. By L. W. VERNON HARCOURT. London: Longmans, Green & Co. 1907.

Although this is not in the strict sense of the term a treatise on a particular branch of legal study, at the same time it will prove of great interest to the lawyer with a historical turn of mind. The sub-title of the book best describes what it in fact is—"A novel inquiry into a special branch of Constitutional Government." How many persons, if asked, would be able to state who or what the Steward of England is, or what were his duties? According to Mr. Vernon Harcourt, the office of Steward of England is one of great antiquity and importance. He has been, and still is, the first officer of State in the kingdom, but, not unlike an angel, he appears but seldom. He has to arrange coronation pageantry, and settle all the details connected therewith—a duty which fortunately does not often bring him to the fore. Another duty of a distinctly unpleasant but happily not of a frequent nature is to preside at the arraignment, for treason or felony, of a peer of the realm. Mr. Harcourt claims that never before has the story of the rise and fall of this great official been seriously investigated, and we can readily believe him. The first part of the work deals with that period during which the dignity was hereditary. This period exemplifies the truth of the French adage that "*L'appétit vient en mangeant*": the hunger for power grew as it descended from father to son. Apparently matters came to a climax, and the office ceased to be hereditary. This period takes up the first six chapters of the book. Then we are taken through the history of trial of peers by peers. This portion of the book will no doubt present a morbid fascination for those readers who are at present interested in the fate of the House of Lords. In former days apparently a Judge had to be of the same rank as the litigants or criminal appearing before him, and so he would, in addition to his other multifarious duties, have to acquire a profound knowledge of the antique equivalent to Debrett or Burke. With the fall of the Steward of England arose the *Curia militaris*, or Court of chivalry. After many vicissitudes this Court was superseded in 1499 by the Court of the Lord High Steward of England, which sat for the trial of the Earl of Warwick. Evidently this Court exists at the present day, although, as the end of the book is somewhat abrupt, the reader is left in considerable doubt as to what is the state of things to-day. Mr. Harcourt takes his subject seriously and has unearthed much material which has hitherto not seen the

light in print. Although we doubt whether the circle of readers will be very extended, yet, when judged from the historical point of view, the book will throw considerable light upon a subject hitherto practically unexplored.

The Annual Statutes, 1906. By J. M. LELY, M.A. London: Sweet & Maxwell. 1907.

The past year was very fruitful in legislation of an important and far reaching character. One year does not often boast of three such far-reaching statutes as the Workmen's Compensation Act, Public Trustee Act, and the Agricultural Holdings Act, not to mention such statutes as those affecting Company Law, Marine Insurance, and Merchant Shipping. Well might the learned Author take as the key-note of his labours the extract from the Diary of the great Mr. Pepys, which appears on the title-page. With such a treatise to refer to, one can say with Mr. Prin, "and then it will be a short work to know the law." It can only be said that the present volume does not fall short of the many others prepared and annotated by the same talented writer, whose sad death every lawyer will deplore.

The German Law of Carriage of Goods by Sea. By Dr. ALFRED SIEVEKING. London: Stevens & Sons. 1907.

In these days of International Commerce any book, dealing, in a simple form, with the law affecting commerce in foreign lands, will always meet with a welcome from English business men. Trade with Germany is so largely on the increase, that there is large scope for books similar to the one under review. Dr. Sieveking takes Part IV of the Commercial Code of May 10th, 1897, which is termed the German Maritime Code, section by section, placing marginal notes denoting the several sections with which he is dealing. In the Introduction he treats of the Ship, the Shipowner, and Master and Crew. In Part I is given the matters incidental to the Port of Shipment and the law appropriate thereto. Part II deals with such matters as arise on the voyage, such as the Master's authority, salvage, and general average, etc. In Part III the ship arrives at her destination, and the author treats of the Consignee, Bills of Lading, liability of owner, liens and other kindred subjects. In the Appendix is given a very useful summary of the law affecting the conveyance of passengers, and here again the subject is divided up under the three heads, "At the Port of Ship-

ment," "The Voyage," and "At Port of Destination." This particular chapter will prove most useful to not only business men, but to the travelling public at large. How many of us, when travelling on the Continent, have been worried by officials and red tape. Dr. Sieveking gives many useful hints as to one's rights and liabilities, which are very welcome. The Index is clear and incisive, and in common with the rest of the book is simple and well written. This little treatise will undoubtedly find a wide circle of readers who do not want to be bothered with a lot of technical phrases, whereas the lawyer will find the law placed before him in clear language.

The Law relating to Workmen's Compensation. By C. M. KNOWLES, LL.B. London: Stevens & Sons. 1907.

Although the Workmen's Compensation Act 1906 repeals the Act of 1897, yet, as it re-enacts most of the provisions of the Act of 1897 with some modifications, a great part of the Case law decided under the former Acts is still applicable. In fact, the only considerable body of cases which have become useless are those concerned with the question of whether the employment in which the injured workman was engaged was included in the Act. The new Act contains many important additions both in the details of compensation and the more important extension of the term "workman." Mr. Knowles's work contains an excellent Table of Contents which very considerably facilitates reference, as well as a full Index. The form is that of a fully annotated edition of the Act, with Appendices containing the text of the Act without notes, and the Compensation Acts 1897 and 1900, and Forms. Mr. Knowles takes pains to print all alterations in the Act, which as far as we have seen are all in favour of workmen. The first section of the Act is one which has necessitated nearly twenty-five pages of notes dealing with, amongst other subjects, that of what is an "accident;" and what is "serious and wilful misconduct." Neither of these questions is easy to answer, but much assistance will be found in the authorities collected and arranged here. The part of most interest is that which deals with the extended scope of the Act. It does not seem to be quite so clear, as has been generally supposed, that domestic servants are necessarily included in the Act; in the opinion of the learned Author it rests upon the introduction of the words "clerical work" into the definition of "workman" that renders inapplicable

the decision in *Simpson v. Ebbw Vale Steel, etc., Co.* Mr. Knowles does not give us quite as much assistance as we should like in considering the many cases of difficulty that may be suggested, such as curates, members of a choir, &c., but it would have been an endless labour to try to enumerate exhaustively the different classes of persons to whom the Act may apply. It will require a good deal of litigation to clear the ground. We may call attention to one valuable comment on *casual* employment, where the Author points out that "employment is not necessarily casual because it is intermittent," and suggests that "a reasonable expectation of being further employed at reasonable intervals by the same employer" would tend to prevent such an employment from being "casual."

The Agricultural Holdings Act, 1906. By G. A. JOHNSTON. London: Effingham Wilson. 1907.

Mr. Johnston's edition of this new and important Act is well worth reading by all interested in land, and it will give them much food for reflection, especially if they happen to be landlords. He comments on the recent Act without directly criticising its policy, but it does not seem to us very difficult to see which side his sympathy is with. He points out the important changes made by the Act all in favour of the tenant, and the serious consequences to landlords which may result from these changes. He does not, however, rest satisfied with simple warning, but suggests means which may possibly in some cases in some measure protect the landlords. A few of these we may point out. He suggests that in the agreement of tenancy the person should be named who is, if necessary, to act as arbitrator, to save both parties the possibly unsatisfactory result of having the arbitrator appointed by the Board of Trade. As the tenant is to be entitled to be in the future compensated for repairs to buildings "necessary for the proper cultivation or working of the holding other than repairs which the tenant is himself under obligation to execute," it would seem advisable for landlords to remodel their covenants for repairs in the direction of greater strictness. The freedom now given to tenants as to cropping and removal of the produce will necessitate special provision in the contract for the "suitable and adequate provision" which the tenant is loosely bound under the Act to make for the protection of the holding. One of the most threatening provisions is that which gives the tenant compensation for the termination of his tenancy by the landlord or his refusal to renew it "without good and sufficient

cause, and for reasons inconsistent with good estate management." What a specimen of drafting! Mr. Johnston suggests two methods of protection against the dangers created by this vague and difficult provision. One is to create tenancies for one year certain, the other is a term so framed that the tenant will probably avail himself of an option to determine it. Whether these methods will hold water does not seem quite certain, but they may be worth trying.

Criminal Investigation. By JOHN ADAM, M.A., and J. COLLYER ADAM. London: The Specialist Press. 1907.

This is a very interesting book. It is translated and adapted from the work of Dr. Hans Gross, Professor of Criminology in the University of Prág, and the adaptors—if we may use their own name for themselves—are barristers practising at Madras. A considerable portion of the work applies to the necessary procedure, &c., in India, and much of this requires more knowledge of various sorts than is necessary in England where experts are more easily found. The qualities with which an investigating officer should be endowed are "indefatigable zeal and application, self-denial and perseverance, swiftness to read men, and a thorough knowledge of human nature, education and an agreeable manner, an iron constitution and encyclopædic knowledge." The only qualities which a book can attempt to supply are some knowledge of human nature and encyclopædic knowledge. This the present work does a good deal towards. There is much excellent advice how to investigate a case, examine witnesses, observe the scene of the crime, preserve blood-stains, footsteps and other real evidence. There is a complete and most interesting dissertation on footprints and finger-marks, accompanied by illustrations. There is an interesting sketch of the theories of hypnotism, which winds up with the satisfactory conclusion that "the question of the working of post-hypnotism is not nearly so interesting as it once appeared to be, as the strength and length of the effect are shown to be very insignificant." Certain portions of this work will be of no assistance to English lawyers as they are peculiarly applicable to India, such as the description and plates of plants used in India for poisoning and abortion. Part also is peculiarly applicable to Austrian experience, such as the details given about gipsies, and their manners and customs. We cannot give an idea of the very wide range of subjects treated here; in fact, if it have a fault, it is that the work aims at being too encyclopædic. There are many subjects alluded to on which the information given is and must be too slight to be of any practical use: for instance,

the forgeries of antiquities, coins, &c. We are rather surprised to find one omission. In treating on bloodstains and discussing the question whether it can be proved if the blood of man can be distinguished from that of other mammals, the only test mentioned is the measurement of the globules. No mention is made of the physiological tests which are now carried to a wonderful degree of accuracy and have, we believe, quite superseded the other test. An important part of the book is the bibliography, giving a list of over 1,200 authorities, which are also referred to in the text. These are very largely German, but there are also numerous French and English publications. The edition of Taylor's *Medical Jurisprudence* referred to is, however, not the latest, being the one published in 1904. The work is well worth anyone's perusal, and is likely to be of considerable value to all who have to investigate crimes, or prosecute or defend those charged with them; and last, but perhaps not least, would be invaluable to a writer of detective stories.

The Law affecting Foreigners in Egypt. By J. H. SCOTT, LL.M. Edinburgh: William Green & Sons. 1907.

Egypt is a *terra incognita* to the majority of Englishmen, notwithstanding that our interests are of such magnitude in that fascinating land. Mr. Scott is well qualified to write on the subject he has chosen for his book, by reason of his holding the post of Lecturer at the Khedivial School of Law, Cairo. In the Introduction he pays a high compliment to Lord Cromer, the great Pro-consul of Egypt, and he appears to hold a very high opinion of Lord Milner's book, *England in Egypt*. The position of foreigners does not appear to be a very enviable one, and is of very uncertain and inequitable tenure. In Turkey and Egypt the rights of foreigners have always been secured by means of treaties called Capitulations, and in the Introduction the learned Author traces the history of these treaties in Oriental States, both Christian and Moslem, from the time of the Christian kings of Jerusalem down to the existing period in Egypt. The Report by Lord Cromer in 1905 pointed out how necessary it was that the Capitulations should be modified and brought up to date. It is curious to notice how bound up with the question of religion is the tenure of land both in Turkey and Egypt. In the former country tenure is of two kinds, Ushûri and Kharadji, which, speaking broadly, is Moslem and non-Moslem. In passing, it is curious to note that ownership is based on a verse of the Koran, which expresses in very similar language the fundamental principle

enunciated by Blackstone as follows: "The earth and all things therein were the general property of mankind from the immediate gift of the Creator." After discussing the Land Laws of Turkey and Egypt, Mr. Scott deals with the Privileges of the Capitulations, which he summarises under six heads. These six heads deal with the essentials for the safe and peaceful residence of a foreigner in Egypt, in a very complete form. In subsequent chapters we have the jurisdiction and powers dealt with of the Mixed and Native Courts, Moslem and non-Moslem Religious Courts, and incidentally of the Consular Courts which are not Egyptian Courts. The next subject dealt with is the Privilege of Legislation, whereby foreigners resident in Egypt are exempt from local Egyptian law, and are subject to certain laws drawn up with the consent and assistance of the foreign Powers. In a final chapter is discussed the question of future reform in the Capitulations. In the Appendix is given the Ottoman Order in Council of 1899, dealing with the English Jurisdiction in Ottoman Dominions. The whole book is of peculiar interest, both from the historical point of view as well as from the legal, and is evidently the result of many years of study and experience. Students of Egyptian history will find therein a fund of information not to be found in the usual handbooks relating to that country.

Second Edition. *The Law of Civil Salvage.*. By the Right Hon. Lord Justice KENNEDY: present edition by A. R. KENNEDY, B.A. London: Stevens & Sons. 1907.

Only the lawyer can tell of the many romances which lie hidden between the covers of the Law Reports. Few, for instance, besides those who practice in the Admiralty Court know of the stirring adventures of the sea recounted in an ordinary Salvage case. In childhood we read the wonderful tales of Captain Marryat and others, concerning the thrilling adventures of a ship's company when saving another vessel during a storm or other time of stress; it is the business of the Admiralty Court to assess in hard cash the amount to be paid to the rescuers. This in a word is the law of Salvage, which sounds so unromantic when clothed in legal phraseology and made the subject of legal argument. In the Preface to the first edition Lord Justice Kennedy traces the origin of the law of Civil Salvage, and points out the elements necessary to constitute Salvage service, the persons by whom, and the circumstances under which, such services can be rendered, and the method for fixing and dividing the amount assessed for such

services. In the present edition the learned Author has striven to preserve as far as possible the original plan of compilation. Certain alterations have been found necessary. The provisions of the Merchant Shipping Act 1894 relating to Salvage have been substituted for the earlier statutory provisions which that Act consolidated. Three Appendices have been added; in the first have been given particulars of Salvage cases chiefly dealing with towing disabled vessels, by far the commonest branch of the subject decided by the Court. The second Appendix contains the provisions of the International Convention for the Unification of the Law of Salvage. A Diplomatic Conference was held at Brussels in October, 1905, and the result of its labours only awaits the sanction of the Legislatures of the various contracting Powers.

It may be stated that the English law of Salvage is practically on all fours with the above provisions. In the third Appendix are set out Lloyd's salvage agreements. Military salvage is not dealt with in the present work, which is confined to Civil Salvage. In the sixteen years intervening between the first and second editions, some one hundred and fifty-six standard cases have been decided; all of these have been incorporated with the text of the present one. New Coastguard Instructions and Instructions to Receivers of Wreck and other Officers have been passed by the Admiralty and Board of Trade, since the first edition; both of these have been utilised by the Author in preparing the second edition. It may be news to many readers that the principles affecting Salvage are derived from the ancient Romans, who appear to have quite recognised the legal value of such services, and the obligation of rewarding them. The whole treatise displays a painstaking endeavour to place before the reader in simple form, an uncommon and rather abstruse question. The text shows a remarkable acquaintance with the details of the subject, which is not surprising to find in the distinguished Author of the first edition. The Index has been re-written and amplified, being both complete and illuminating of the contents of the volume.

Third Edition. *Godefroi's Law of Trusts.* By W. L. RICHARDS and J. I. STIRLING, M.A. London: Stevens & Sons. 1907.

In the Preface to the second edition, Mr. Godefroi states that the aim of his book is to deal with the general Law of Trusts in such a way as will enable the student to find general principles governing Trusts and the practitioner to find all the latest authorities on the subject. The successful carrying out of this object, together with

the great erudition of the learned Author, has placed his work in the front rank of Standard authorities. The second edition was published in 1891; since then much legislation has been passed and a mass of authority has accumulated. Notably we have the Trustee Acts of 1893 and 1894, the Judicial Trustee Act of 1896, and the Public Trustee Act of 1906, together with the many judicial interpretations of their several sections. Mr. Godefroi was unable to prepare the present edition himself, so delegated the duty to Mr. Richards. However, the latter had the great benefit, in the early stages, of Mr. Godefroi's personal supervision, both up to the time of his retirement from the Bar and up to the time of his lamented death in 1900. This date gives some idea of the many years' work that have been expended on the preparation of the present edition, and the learned Authors have good cause to congratulate themselves on the pronounced success of their arduous labours. As far as possible, the original form of compilation has been preserved, but the great change of modern legislation has necessitated some revision and re-arrangement. The chapters dealing with the Settled Land Acts, the Statute of Limitations, and Voluntary Trusts, have been amplified and partly re-written. It must not be thought that owing to the length of time taken in preparation that necessarily it is not up to date. All cases reported down to the end of 1906 have been incorporated in the text. Mr. Arthur H. Reed is responsible for compiling the Table of Cases, a work which, as far as can be seen, has been carefully and fully carried out, both as to the references and the number of places in which each case is reported. The Appendix contains the text of the Trustee Acts 1893 and 1894, the Judicial Trustee Act 1896, and the Public Trustee Act 1906, a fact which creates an ease of reference and obviates the necessity of having several volumes of statutes together with the treatise itself. It is stated that the Index has been reconstructed and revised by a Chancery Barrister. That gentleman has not been quite as happy in his efforts as he might have been. There is a redundancy of headings, and a vagueness about some of the sub-headings, which should be corrected in a subsequent edition. However that may be, it is a minor criticism of a work which in its entirety displays the careful thought and erudition which is to be expected in a treatise of this nature. We can pay the learned Authors no higher compliment than to say that they have proved themselves worthy of the trust imposed upon them by the late Mr. Godefroi.

Third Edition. *Where to find your Law.* By E. A. JELF, M.A. London: Horace Cox. 1907.

In his Preface the learned Author of this work states that he "has learnt that it has been in use in South Africa, Canada and New Zealand, and in other widely separated parts of the English-speaking world." It may interest him to know that both in the High Court Library of Johannesburg and in the Supreme Court Library of Pretoria, in Great Britain's youngest Colony, a copy is kept, and is much appreciated by the users of both Libraries. When *Where to find your Law* first appeared there were many who said, "What a good idea, why did no one think of it before?" Well, no one did, and to Mr. Jelf belongs the kudos of originating a novel subject for one of the most useful works to be found in a lawyer's library. Many a weary lawyer must have blessed the learned Author for saving him an incalculable amount of trouble when searching for a treatise in which some particular point is dealt with. In the third edition the high standard of the first has been well maintained. It must be hard work to keep abreast of the multitude of treatises which come out every year on every conceivable branch of law. Be that as it may, we have here information concerning all the textbooks, statutes and reports of cases. He would be a daring man who attempted to preserve a tithe of this accumulation in his head; with Mr. Jelf to lead him, he can, however, place his finger on the right source for information in a very short time. After all, most lawyers do not want to burden their minds with more than an everyday fund of knowledge, but it is essential to be able to put one's finger on the law affecting any unusual point at a moment's notice. This is the practical utility of Mr. Jelf's book, and because he has fulfilled his task with ability, his book is so very popular with lawyers. The size and complexity of its contents, is an ever-standing argument in favour of some sort of codification of our laws. Several branches have been codified; let us hope that the process will continue and be completed in due time. Until that much hoped-for epoch arrives, the book under review will continue to be in the future, as it has been in the past, a standard work for everyday use.

Third Edition. *Heywood and Massey's Lunacy Practice.* By N. A. HEYWOOD, A. S. MASSEY, M.A., and R. C. ROMER. London: Stevens & Sons. 1907.

The popularity of this treatise is clearly demonstrated by the fact that within the space of seven years it has been found necessary to

issue three editions. The present edition has been entirely rearranged and re-written. Divided into three parts, the first deals with precedents and contains dissertations on practice. Here is set forth every conceivable form required in matters affecting lunacy, whether recourse has been had to the Lunacy Court or not. The comments or dissertations are very clear and instructive. Part I takes up 260 pages; and in the Second Part may be found the Acts of 1890 and 1891 consolidated, annotated and explained, with cases decided thereon. One can well believe the learned Authors when they expatiate upon the amount of research necessitated by their labours in respect of Part II. In matters peculiarly appertaining to that journal—namely, the powers of local authorities and of justices—the Authors own ungrudgingly their debt of gratitude to the *Justice of the Peace*. The Third Part contains the Rules of 1892, 1893, and 1900, with notes and comments thereon. Mr. F. A. Corley, of the Lunacy Taxing Office, has revised the Bills of Costs to be found in the Appendix. Last year a most important Bill was introduced into the House of Lords and passed its third reading. This Bill, the Settled Land Bill of 1906, was intended to bring about a most important reform in the Lunacy Laws and to remove the defects of the jurisdiction in lunacy disclosed in *In re Baggs* (L. R. [1894], 2 Ch. 4, 16) and *In re S. S. B.* (L. R. [1906], 1 Ch. 712). By one of the provisions of the Bill, section 62 of the Settled Land Act 1882 would be supplemented, and a receiver appointed under the Lunacy Act 1890 would have power to deal with the tenancy for life or powers of a tenant for life, under the Settled Land Act of 1882, possessed by a person not being a lunatic so found by inquisition. This would place such receiver upon the same footing with a committee of the estate of a lunatic so found, as regards section 62 of the Settled Land Act of 1882. It is to be hoped that such a Bill will soon become law. The learned Authors have succeeded in producing a standard work which is easy of reference, and is to be recommended to anyone seeking information concerning matters in Lunacy. The Index is decidedly good, and presents a complete key to the contents of the book.

Third Edition. *Patent Law and Practice.* 2 vols. By ROBERT FROST, B.Sc. London: Stevens & Haynes. 1906.

The present Patent law is an evolution of the old Statute of Monopolies passed in the time of James I, to curb the right claimed by former Sovereigns of England to grant monopolies for carrying

on certain trades or producing various articles within the kingdom, or importing them from without. By this means large sums of money had been raised to the detriment of the public at large. At the present time Patent law is perhaps one of the most technical branches of English Jurisprudence, necessitating, in the practitioner, not only a large store of legal knowledge, but also a considerable grasp of the principles of science and mechanics. The work under review is dedicated to one of the most famous Patent lawyers of the present generation, Lord Alverstone, the Chief Justice of England. Since the last edition of this work two Patent Acts of 1901 and 1902 have become law. In addition, new Rules have been drawn up, regulating matters of procedure both at the Patent Office and before the Judicial Committee of the Privy Council. These Rules, together with a mass of fresh judicial decision, have been digested and dealt with in the present edition. A novelty introduced has been the division of the treatise into two volumes in place of one. The learned Author has striven to place all matters affecting contentious or quasi-contentious business in Volume I, so as to obviate the carrying about of both volumes during the hearing of a Patent Case. The Table of Cases and Index have been inserted in both volumes, a very excellent and meritorious arrangement. A list of the names of the Defendants in the cases cited is a feature we do not remember having come across before. The Index is complete, and supplies a satisfactory key to the contents of both volumes. In the Preface, Mr. Frost appears to be somewhat nervous as to the result of his labours. Such lack of self-confidence appears, however, to be groundless, and the Author is to be congratulated upon producing a treatise which must continue to be regarded as a standard work on a very abstruse and important branch of legislation.

Third Edition. *The Law of Building, Engineering, and Shipbuilding Contracts.* 2 vols. By ALFRED A. HUDSON. London: Sweet & Maxwell. 1907.

Fourth Edition. *Emden's Building Contracts, Building Leases, and Building Statutes.* By J. B. MATTHEWS and W. VALENTINE BALL. London: Butterworth & Co. 1907.

Building Cases. By F. ST. JOHN MORROW, LL.D. London: Butterworth & Co. 1906.

More than ten years have elapsed since the last editions of Emden's *Building Contracts* and Hudson's *Law of Building Contracts* were published. Since that time very many important points

on the construction of Building Contracts, and the legal liabilities of parties thereto, have been decided by the Courts. Many of these cases are reported only in *The Times* or in technical journals; of others, the reports are only now published in the Addendas of unreported cases contained in these volumes. The present editions, therefore, of these two well-known works provide for practitioners much useful information which has hitherto not been accessible in any handy form. The case of *Kellett v. New Mills Urban District Council*, reported at page 329 of Mr. Hudson's work, is one of considerable interest, Mr. Justice Phillimore ruling that it is not necessary for the contractor to show collusion on the part of the employer, where a certificate had been wrongfully withheld by the architect, if he can shew, that the employer has taken advantage of the architect's refusal to certify, with knowledge that such refusal was a wrongful act on his part. Interesting as these unreported cases are, it must be remembered that they are not, when taken from technical journals, citable in the Courts, and it may be doubted whether the multiplication of reports of this unauthorised character is not becoming a burden rather than a benefit to the profession. Both these works contain a number of useful forms and precedents, and Emden's *Building Contracts* contains a glossary of architectural and building terms which should be very useful to the lawyer, whose difficulty in building cases, is often more a difficulty in arriving at the true facts through a mass of technical terms, than in applying the law to the facts when established.

The digest of building cases which Dr. F. St. John Morrow has compiled would form an excellent introduction to the subject for students of Building Law. The effect of the cases is stated in a brief and interesting manner. The arrangement of topics might perhaps be improved, but an extensive Index remedies such defect as there may be in this respect.

Third Edition. •*Conditions of Sale.* By W. F. WEBSTER, M.A. London: Stevens & Sons. 1907.

The industry of Mr. Webster has included in this edition not only the reported cases down to the end of 1906, but some unreported cases. He has also followed the "useful practice" of giving the dates of the decisions. Mr. Webster is a well-known authority on the somewhat technical subject which he treats, and a new edition will be welcome to conveyancers and all concerned in the

sale and purchase of land. It is a subject on which a sound guide is very necessary. It is based, we may say, entirely on Case law, and principles seem difficult to arrive at. Let us take an instance from the chapter on Misdescription. In *Hill v. Buckley* a deficiency of 26 acres out of 217 was held not to be covered by the words "more or less," while in *Winch v. Winchester* a deficiency of 5 out of 41, or exactly the same proportion, was held to be covered by the same words. Perhaps the fact that in the last case there were also the words "by estimation" made the difference. Many difficult points have to be considered, such as "how far the vendor's knowledge is a material element in a case of mis-disclosure." The law does not seem quite clear, and the difficulty is not only "what difference the vendor's knowledge or ignorance makes in regard to his liability to disclose material facts, but it is difficult in many cases to say whether the matter in question is or is not one which the vendor ought to have disclosed." Mr. Webster seems to have caught Joyce, J., nodding when he said in *Seddon v. North Eastern Salt, etc.*, "As far as I know, silence has never yet been held to amount to misrepresentation." Several cases are cited to uphold the Author's contention that it may. The contents of the work are divided between Particulars and Conditions of Sale in about the proportions of one to two.

Third Edition. *The Law of Mines, Quarries and Minerals.* By R. F. MACSWINNEY, M.A. London: Sweet & Maxwell. 1907.

In a country like England, possessing so much mineral property, the law affecting mines is of necessity a very important branch of legal study. It is curious that, even up to the present time, the law defining "minerals" should be in such an unsatisfactory condition. It certainly looks as if a leaf could be taken, with advantage, out of the book of Great Britain's youngest Colony, the Transvaal, where there has not been any very great trouble in meeting an analogous difficulty. Mr. MacSwinney seems to be very pessimistic regarding both the decisions and the legislation affecting his particular subject in modern times. Perhaps he is a believer in the old saying, "*effodiuntur opes irritamenta malorum.*" The learned Author calls attention to the many new important decisions in the Court of Appeal, House of Lords, and Privy Council, on such vital points as the legal meaning of the word "mineral," the circumstances under which a mine becomes "open," the position with respect to mines under the seashore and the sea, and many

other kindred subjects. The hand of the reformer has not been idle. The Land Transfer Act of 1897 contains many complicated provisions for registering titles, many of which relate exclusively to mines; Mr. MacSwinney waxes caustic over these. Further new legislation has been passed in the shape of the Mines (Prohibition of Child Labour Underground) Act 1900; the Coal Mines Reg. Act 1887, with an amending one of 1903; the Coal Mines (Weighing of Minerals) Act 1905; and the Notice of Accidents Act 1906; not to mention several new orders as to explosives under sect. 6 of the Coal Mines Act 1896. Much of the modern legislation does not appear to meet with the approval of the learned Author. He denounces in unmeasured terms the Trade Disputes Act 1906, an opinion in which many, no doubt, will agree. The Workmen's Compensation Act of 1906 is damned with ambiguous and faint praise. No doubt many of the comments and wholesale condemnations are well-founded and well-deserved, but it is open to question whether a legal treatise is quite the proper place to indulge in such tirades. One generally consults a law book for the law and decisions on any given subject, hardly for the private opinions of the Author on the legislation affecting the same. Mr. E. L. Megarry of the Chancery Bar appears to have done almost sufficient work to entitle him to occupy the position lately occupied by Mr. Justice Bristowe. Apart from these minor criticisms, the present edition fully maintains the position gained by former ones, and no doubt the book will continue to occupy the position of a standard work on the subject. The list of *addenda* and *corrigenda* is considerably longer than it should be, and we should suggest that a list of the contractions of names of statutes should be added, as some of the contractions are not altogether clear. The List of Cases is very complete and well arranged. The Index is excellent, with the exception of some few headings which err on the side of excessive brevity and terseness, but perhaps this will be rectified in a subsequent edition when the inconvenience of it has been fully exemplified.

Third Edition. *Employers' Liability.* By C. Y. C. DAWBARN, M.A., with notes on the Canadian Law by A. C. F. BOULTON, M.P. London: Sweet & Maxwell. 1907.

The Workmen's Compensation Act 1906. By F. L. FIRMINER. London: Eyre & Spottiswoode. 1907.

The Workmen's Compensation Act 1906. By HENRY LYNN. London: Jordan & Sons. 1907.

No sooner is a new statute of any importance passed than new editions and new books are produced as fast as the printing press can turn them out. The Workmen's Compensation Act 1906 is no exception to this rule. Mr. Dawbarn's book deals with Employers' liability both under Common law and Statute law, still it is the 1906 Act which has brought forth this the third edition. Perhaps the most prominent features in the book are Appendices A and B, which contain Forms of every possible kind and description. Mr. Boulton has added notes on the Canadian law, which although not unreservedly authorities in English Courts, yet on disputed points give great assistance by analogy. The whole book is well got up, and the completeness of the information contained in it will recommend it to a large circle of readers.

Mr. Firminger's volume treats only of the 1906 Act, which he commends as "essentially humane in its features, for it establishes the right substantially of all classes of the working community to obtain compensation for injuries in the service of the employer." The book is carefully compiled, and is intended for the Profession, for Insurance Companies, and for all those whose business will require reference to the Acts, and will no doubt find many readers.

Mr. Lynn's book is, perhaps, the best thought-out handbook on the 1906 Act that has come under our notice, and the popular edition, price one shilling, should, on its merits, have a very large sale. In the Introduction he points out very clearly the novel principles and extensions introduced by the Act. The whole book shows that the learned Author has had in view, not only the display of legal learning, but has also sought to so arrange his subject as to place it before the reader in a simple form and unburdened by irrelevant matter. To any lay reader who wants to get a clear understanding of the provisions of this involved Act, we can safely recommend the purchase of a copy of this little work.

Fourth Edition. *Powles and Oakley on Probate.* By L. D. POWLES, W. M. F. WATERTON and E. L. MANSBRIDGE. London: Sweet & Maxwell. 1906.

The fourth edition of this standard work has been re-arranged and in a great part re-written. Part I, which deals with the Law, has been done by Mr. Powles, whereas Part II, dealing with the Practice, is the work of the other two Authors. A chapter on "Notations" has been written by Mr. Frederic Upton, late chief of the Depart-

ment. The method of arrangement adopted in this edition, whilst lending itself to ready reference, naturally tends towards repetition, but that is only to be expected, and does not to any great extent detract from the great practical utility of the work. In these days of extended commerce it becomes more than useful that everybody should be aware of the general principles governing persons capable of making a will, together with how to execute the instrument itself. These points are adequately treated by Mr. Powles, whose knowledge acquired as District Probate Registrar at Norwich, enables him to give many practical hints which he otherwise could not have done. Messrs. Waterton and Mansbridge have done their share very well, and in Part II one traces the master hand in the result of their labours. Their treatment of the subject of contentious Practice gives all information necessary to practitioners in that particular department of Law. In the Appendix are set out all the laws affecting Probate and germane thereto, together with a full collection of forms usually required in both contentious and non-contentious business. The present Authors have revised, condensed, and alphabetically arranged in the sub-heads the Index. The Index is complete, and constitutes a reliable key to the text of the book. The whole book is remarkable for the simplicity of the language employed; a fact which will commend it more especially to the lay reader. That it has reached the fourth edition is ample proof, if any were needed, that there is great scope for a work of this nature. In conclusion, one is bound to state that the present edition is quite up to, if not exceeding, the high standard set by the three former ones.

Fourth Edition. *The Law of Evidence.* By S. L. PHIPSON, M.A. London: Stevens & Haynes. 1907.

We are glad to see a new edition of Mr. Phipson's most valuable work. It occupies an unique position between the concise digest of Stephen and the bulky tomes of Taylor. Its arrangement is peculiar to itself, and the historical notes to each chapter add considerably to both its value and interest. The arrangement of examples in parallel columns of cases where the evidence was admitted and was not, is striking and instructive. Mr. Phipson hopes now to have reached something like finality in form and dimensions. The present edition is somewhat larger in bulk than the last, which perhaps is accounted for by the more exhaustive treatment of the subjects of Similar Facts, and Extrinsic Evidence

affecting Interpretation, and the addition of over a thousand new cases. We notice with interest that two small criticisms which we made in a review of the last edition are no longer applicable. Whether attributable to our notice or not, it shows the care with which it has been revised.

Guide to Church Law. By a SOLICITOR. London : Horace Cox. 1907.—Doubtless intending his book as a practical guide for churchwardens and others unlearned in the law, the Author, we think, might have made some allusion to the Act (Workmen's Compensation) which is most vexing the souls of those we know. Strictly perhaps, it is not within the purview of this small handbook, which contains a good deal that is interesting and may be useful to those occasionally concerned with Ecclesiastical law. In three parts, it treats successively of the origin of Ecclesiastical Divisions, Courts, &c. ; of Church Dignitaries, Authorities, &c. (we do not quite follow why pews and tithes have sub-headings in this part) ; and Abridgment of Acts. There is also a glossary of legal terms.

The Revised Table A. By P. F. SIMONSON, M.A. London : Effingham Wilson. 1907.—Anyone might be puzzled as to the subject of this book before reading the sub-heading on the title-page, which informs us that it is the revised first schedule to the Companies Act 1862. It was, the Author tells us, the specimen form of regulations applicable to companies registered, and has now been revised by the Board of Trade, empowered by the Act. Very many alterations have been made, not all of them very successful, it appears. The object of the book is to state the law bearing on the Table's various clauses, and in this it succeeds, we think. The general effect of the clauses is explained with reference to all the necessary cases. The Table of Cases records the date (a commendable innovation), and the name of the Judge, but omits reference to the Reports.

Prescription and Custom. By T. H. CARSON, K.C. London : Sweet & Maxwell. 1907.—Mr. Carson has here published six lectures given by him on Prescription at Lincoln's Inn. He limits himself to "the doctrine under which defined persons acquire a title to certain purely incorporeal hereditaments, such title resulting from acts of user and lapse of time." After dealing with Prescription

generally, he writes of it in relation to Rights of Way, Watercourses, Light, etc. The last chapter he devotes to Custom. The subject is treated with the authority and lucidity one would expect. References to the Reports in the Index would improve the book.

The Marine Insurance Act 1906. By E. L. DE HART, M.A., LL.B., and R. I. SIMEY. London: Stevens & Sons. 1907.—This is merely an annotated edition of the new codifying Act, with references to the cases on which its provisions are based. It will no doubt serve its purpose.

Contracts of Local Authorities. By W. C. MAUDE, B.G.L., M.A., and C. H. LEACH. London: The Poor-Law Publications Company.—This book will doubtless be of use to the Clerks to Guardians and District Councils, for whom, say the authors, it is primarily intended. In the first part of the book the powers of Authorities to contract, the law relating to various Authorities, contracts for buildings, etc., and such matters as the interest of members and officers in contracts are discussed; the second part contains Forms and Precedents. The facts of cases referred to, together with quotations from the deciding judges, are given with greater freedom than in most works of the kind.

Summary of the Institutes of Gaius. By T. R. POTTS, D.C.L. Oxford: Hubert Giles. 1907.—This addition to the numerous books dealing with Roman law claims to supply the want of a beginner's History of Roman law. To the Oxford men for whom it is designed it may be serviceable. In the first eighty pages Mr. Potts traces the growth of the law and its Institutions. The second part is a summary of the Institutes, with excellent notes, generally incorporated in the text.

Third Edition. *The Student's Guide to the Principles of Equity.* By CHARLES THWAITES. London: George Barber. 1907.—This is one of Mr. Thwaites's well-known and useful guides to Bar students. Beginning with some excellent advice as to the course of reading, the rest of the book is taken up by questions on Indermaur and Thwaites's *Manual of Equity* and a Digest of Questions and Answers.

Leading Cases on the Law of Evidence. By E. COCKLE. London: Sweet & Maxwell. 1907.—One would have thought that with the myriad of standard works, both elaborate and in handbook form, on the law of evidence, there was no room for a new writer. Mr. Cockle seems to be of a different opinion, and after reading his book one is bound to agree with him. He treats his subject in quite an original manner, and in a way that will appeal to the lawyer in a hurry. The learned Author picks out his points, writes a head-note of his own on each, and groups together under each head-note the leading cases applicable thereto. The cases, too, are dealt with in quite a novel manner. The principle illustrated is extracted from each authority and placed in the form of a condensed head-note under the name of the case. Sufficient only of the facts are stated to make the point of evidence clear, all others being excluded as tending to confuse the issue. The same method is applied to the judgments; the more important passages are emphasised in heavy type, whereas the rest is omitted as tending towards confusion. Of course this method gives the reader only what *in the opinion* of the Author is sufficient to elucidate the point, and a full reading of the case may make one differ from him, "*quot homines tot sententia.*" Still it must be confessed that Mr. Cockle has carried out his work in an eminently satisfactory and ingenious manner. All the old friends appear to be present among the authorities so given, although some look quite different in their condensed form. Another novelty is the absence of an Index, the necessity for which has been obviated by a very elaborate Table of Contents at the beginning. Mr. Cockle is much to be complimented upon the daring of his experiment, which, if successful, will probably find many imitators. Moreover, without prophesying, it will be extremely interesting to watch how far it will prove successful among a body of probably the most critical of readers.

An Epitome of Constitutional Law and Cases. By W. H. HASTINGS KELKE. London: Sweet & Maxwell. 1907.—This epitome is based on Broom's *Constitutional Law*, and is intended as an introduction to Dicey and Anson, and in its limited space contains a great deal of matter which should be useful to students. It treats of such subjects as "Allegiance," where reference is made to *Calvin's Case* and the *Case of the Hanoverian Electors*; "Rights of Subject," under the sub-divisions of "liberty," "property," and "observance of laws." There are a number of cases cited here from *Somerset's Case* on slavery, to *Dean of St. Asaph's Case* on seditious libel. The position of the executive and the relations of executive and subject are treated of in four chapters. Amongst other cases referred to are those connected with Wilkes, and the report of the Featherstone Commission. Parliament and the Colonial Constitutions complete the work. It is short and clear, and seems to be accurate, but even at the expense of slightly increased length we should have preferred to have seen fewer abbreviations and elisions of articles.

Practical Hints on Pleading. By A. A. EUSTACE. London: Stevens & Sons. 1907.—A little book which should be of considerable use to young pleaders. Although pleading is no longer the fine art it once was, skilful pleading often conduces towards winning a case. Mr. Eustace's examples have been selected

from actual practice, and his advice and comments are shrewd and practical. In the Appendix there is a convenient summary of the most important Rules and Orders from "Commencement of Action to Trial."

The Law relating to Demurrage. By J. E. R. STEPHENS. London: The Syren and Shipping. 1907.—The Author states that his book is designed for merchants and lawyers, both here and in America. There being apparently no other book entirely devoted to the subject, and Mr. Stephens having collected many American decisions, the book may succeed in this rather wide design. It is divided into six chapters. The first deals with the definition of terms such as Demurrage, Lay Days, Working Days, etc., the second and third with loading and discharging, and causes of detention in these. Lay Days, Cesser Clauses and Liabilities under Bills of Lading, occupy the last three chapters. That the Case law of the book is complete is shown by the inclusion of decisions of Channell, J., and Bray, J., of January and February, 1907. The leading cases, both English and American, are fully discussed. An admirable Table of Cases (which certain legal authors would do well to take as a model) and a good Index complete a useful and workmanlike book.

The Duties and Powers of an Arbitrator. By A. R. RUDALL. London: Effingham Wilson. 1907.—We should imagine that many men have acted (and possibly efficiently) as arbitrators without possessing all the qualifications prescribed for them by Mr. Rudall in his Preface; but the small text-book he has produced will, it is likely, prove serviceable to laymen who have to conduct references. The Author has divided his book into sections. The first discusses the Arbitrator, and his jurisdiction, the Submission, etc.; the second the Principles of Conducting the Reference; the third the Hearing, etc.; the fourth the Award, and the fifth the Costs. Appendices contain the Arbitration Act 1889 (which is rather confusedly described in the Contents) and Forms. The book is clearly written, with sufficient references, and the system of large-type headings adopted will commend itself. There is a fair Table of Cases.

Second Edition. *Elements of Contract.* By A. T. CARTER. London: Sweet & Maxwell. 1907.—The little work under review is one of the Student's Series published by Messrs. Sweet & Maxwell for those who stand on the threshold of Legal Study. Mr. Carter, as one of the Readers to the Inns of Court, is well qualified to determine what is needed for such a treatise on Contract. Not professing to deal with the more obscure legal conundrums, he discusses in plain, simple language the principles which underlie the formation, carrying out, and discharge of a contract. Not overburdened with tedious technical detail, the book nevertheless gives a very adequate survey of the whole subject. Chapter XIV will prove of considerable utility to the Student, giving as it does specimens, with illustrations and notes, of some of the more important mercantile documents in everyday use. Appendix A puts in a handy form a few notes on the documents used in the formation of Companies. Appendix D sets out in full the Sale of Goods Act 1893. The Index, for its conciseness yet completeness, might well form a model for many a more pretentious work, whether legal or otherwise. The popularity with Students of this handbook is testified to by the fact that a second edition has been found necessary, and we think that the success is amply justified.

CONTEMPORARY FOREIGN LITERATURE.

De la Responsabilité des Administrateurs dans les Sociétés anonymes en Droit français et suisse. By ALBERT CALEB, Docteur en Droit. Geneva: 1906.

A treatise for the doctorate at the University of Geneva. The subject, put shortly, is the liability for delict of any officer of a company who exercises *gestio*. English law is treated at pp. 56, 146, where a fairly correct abstract is given, and Dr. Caleb wields the authorities of a foreign system with considerable ability. There are probably personal reasons for the disproportionate amount of space allotted to Bulgaria.

Zeitschrift für Völkerrecht und Bundesstaatsrecht. By Prof. Dr. JOSEPH KOHLER. Breslau: 1907.

This is nominally a periodical, but really a series of reports and discussions on some of the most vital questions of International and Public law. It contains an unusual amount of English and Scottish cases. Among the more interesting contents are a decree of the Florentine Republic of the thirteenth century as to reprisals, and a review of the law as to national jurisdiction over arms of the sea (*Meerbusen*), with special reference to the Moray Firth case (*Mortensen v. Peters*) in the Court of Session in 1906. Among the books reviewed the new edition of Sir William Markby's *Elements of Law* finds a place, and so does Mr. Oppenheim's *International Law*.

Der schottische Rechtskörper in Vergangenheit und Gegenwart. By Dr. WALDEMAR PETERS. Berlin: 1907.

A historical sketch of the Scottish judicial system, ancient and modern. It is of astonishing research and learning for a foreigner, and there is many an advocate in Edinburgh who might learn a good deal from it. If one may venture to single out for commendation one part rather than another, it would be the introductory chapter on the royal and local jurisdictions before the establishment of the Court of Session in 1532.

Über die völkerrechtliche Clausula Rebus sic stantibus. By Dr. BRUNO SCHMIDT. Leipsic: 1907.

This forms Vol. VI of the valuable series *Staats-und völkerrechtliche Abhandlungen*, some volumes of which have already been noticed in this Magazine. As the learned writer says, the clause *rebus sic stantibus* is of usual occurrence in old treaties, but is at present usually implied rather than expressed. The work examines the main instances in which one of the high contracting parties has set up change of circumstances as an answer to alleged breach of treaty obligations. The classical case is the view taken by Russia in 1871 of some of the provisions of the Treaty of Paris. A later one is the refusal of Russia in 1886 to carry out Art. 59 of the Treaty of Berlin under which Batoum was to be a free port. These and many other instances are skilfully analysed by Dr. Schmidt.

Handbok i Svensk Privat Internationell Rätt. By Prof. C. A. REUTERSKIÖLD. Uppsala: 1907.

This is the second of a series *Foreläsningar öfver Privat Internationell Rätt*, now in course of publication. The contributions of Scandinavian jurists to International law in modern times have not been numerous, and in the present volume only Olivecrona and Synnestvedt are named. Of authorities in the English language reference is made to Story, Wharton, and Westlake. The heads of the work are general principles, procedure, territorial and personal statutes, criminal law, inheritance and family law.

Sulla Utilità dello Studio del Diritto Privato Inglese in Italia. By Prof. MARIO SARFATTI. Milan: 1907.

The learned writer's interest in English legal problems is well known. This work is still another example of the increasing study of English law by jurists of Continental Europe. The basis of the discourse may be said to be Wyclif's words—cited on p. 17—*et hinc leges Angliae excellunt leges imperiales*. Some of the grounds for the study of English law are the immense geographical extent of its influence, the judicial evolution of its principles, and the construction of its strong central appellate tribunals. At p. 15 this Magazine, Vol. XV, p. 225 (May, 1890), is cited as an authority.

L'Orientazione Psicologica. . By Prof. ALESSANDRO BONUCCI.
Perugia : 1907.

There is an ethic and a psychology of law. There is also a psychological ethic and an ethical psychology. The resultant of these is a psychological and material orientation with regard to both law and the State. Finally, there is an indefinite number of orientations of allied studies. But what these are Prof. Bonucci does not make very clear.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space:—Bentwich's *War and Private Property*; Burge's *Colonial and Foreign Law, Vol. I*; Ryckère's *La Servante Criminelle*; Chandler's *Guide to Trust Accounts*; Ruegg's *Employers' Liability and Workmen's Compensation*; Jackson and Gosset's *Investigation of Title*; Wood-Renton and Phillimore's *Colonial Laws and Courts*.

Other publications received:—Pike's *Public Records and the Constitution* (Henry Frowde); Gregory's *Study of International Law in Law Schools*; *Lawyer's Reference Book* (Sweet & Maxwell); Gregory's *Controversy as to British Jurisdiction over Foreign Fishermen*; *Reports of the American Bar Association*, Vol. XXX, Part II (Dando Printing and Publishing Co.); Stolypin's *The Great Point at Issue* (Probsthain & Co.); *The Citator* (India); Brackenbury's *Exposition of the Prevention of Corruption Act*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

